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REPORT

OF

CASES ARGUED AND DETERMINED

IN THE

Supreme Court of Alabama,

DURING THE

NOVEMBER TERM, 1906-1907.

—BY—

LAWRENCE H. LEE,

SUPREME COURT REPORTER.

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\* Appointed on resignation of Judge Almon.

§ Appointed on death of Chancellor Altman.

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\*Appointed on resignation of Judge Norvelle.





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# CASES

IN THE

## SUPREME COURT OF ALABAMA.

NOVEMBER TERM, 1906-1907.

### Bradford v. The State.

#### *Attempt to Escape.*

(Decided Jan. 24th, 1907. 42 So. Rep. 990.)

1. *Escape; Indictment; Punishment.*—Construing together Secs. 4707, 4710, 4461 and 4462, it is held that an indictment that charges that the defendant, having been convicted of grand larceny and sentenced to the penitentiary, did attempt to escape before the expiration of his sentence from the county jail where he was held in custody under authority of law, charged the offense defined in Section 4707, and punishment should have been imposed under that Section, and not under Section 4710. (overruling *Bradford v. The State*, 146 Ala. 150, 41 South. 471.)
2. *Criminal Law; Sentence; Conformity to Charge.*—A sentence imposing punishment under Section 4710, although the conviction was had under an indictment charging the offense defined by Section 4707, being within the period of limitation as to time prescribed by Section 4707, is not void or erroneous.

APPEAL from Montgomery City Court.

Heard before Hon. W. H. THOMAS.

J. M. Bradford was convicted under Code 1896, § 4707, making it an offense to escape from the penitentiary, hirer, or guard, etc. From the sentence and judgment he appeals. On the former appeal in this case the judgment was reversed, and the case remanded for new sentence in accordance with the decision. The indictment charges that J. M. Bradford, whose christian name is to the grand jury unknown, having been convicted of the offense of grand larceny in the city court of Mont-

[Bradford v. The State.]

gomery, of Montgomery county, Ala., at the October term, 1905, of said court, and duly sentenced to the penitentiary of the state of Alabama, did attempt to escape before the expiration of his sentence from the county jail of Montgomery county, Ala., where the said J. M. Bradford was held in custody under authority of law, against the peace and dignity, etc. The court, in resentencing the prisoner, fixed his punishment at six months' hard labor for the county, with an additional term to pay the costs of the trial. This was done over the objection and exception of the defendant, and from this sentence and judgment, this appeal is prosecuted.

No counsel marked for appellant.

MASSEY WILSON, Attorney General, for State.—The lower court merely followed the mandate of this court in pronouncing sentence. The objection of the defendant to the action of the court in pronouncing sentence is not presented by a bill of exception and cannot be reviewed.—*Bolling v. The State*, 78 Ala. 469. The grounds of objection are not shown by the record.—*Hooper v. The State*, 141 Ala. 111; *McQueen v. The State*, 138 Ala. 63.

TYSON, C. J.—When this case was here on former appeal, it was reversed on account of an erroneous sentence. It was then held that the trial court should have imposed the punishment fixed by section 4710 of the Code of 1896. That section makes it an offense for any prisoner to escape from lawful custody, when there is no other punishment prescribed by law, etc. It does not make it an offense for a prisoner to attempt to escape, and therefore the punishment prescribed by it cannot be imposed where a conviction is had under an indictment charging such an attempt as here. Nor does section 5306 have the field of operation accorded to it in the previous opinion. Indeed, it has no application whatever. Had the indictment charged the offense of an escape under section 4710, and the evidence established an attempt to escape, it may be that this section would have been applicable, and a conviction could have been had under it. But in that case the punishment could not have been



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imposed as prescribed by section 4710, but as prescribed by section 5414. And clearly, if the indictment was not preferred under section 4707 of the Code of 1896, it charged no offense whatever, unless it was an offense at common law for a convict to attempt to escape, after sentence to the penitentiary and before its expiration, from the county jail where held in custody under authority of law.

But we are of opinion that the offense here charged, though it may be defectively alleged, rendering the indictment subject to demurrer, is the one defined by section 4707, and that the punishment imposed by the court in the first instance was not erroneous. Had the indictment alleged the defendant's attempt to escape before the expiration of his sentence from the sheriff or jailer of Montgomery county having him in charge under authority of law, instead of his attempt to escape from the county jail of Montgomery county where he was held in custody under authority of law, there would scarcely be a diversity of opinion that it was preferred under this statute. By section 4461 of the Code of 1896 it is made the duty of the judge of the court, when a convict is sentenced to the penitentiary, to order such convict confined in the nearest secure jail; and there the convict is to be confined until the president of the board of inspectors shall direct his removal to his place of confinement or hard labor under the sentence. Section 4462 requires the sheriff having in his custody any person sentenced to the penitentiary to deliver such convict to the person who presents the written order of the president of the board of inspectors. With these two sections taken in connection with section 4707, it seems to us beyond cavil that the indictment was intended to charge, and did in fact charge, the offense defined by the latter section. It follows, therefore, the former opinion in this case on this point is wrong, and must be overruled. However, the punishment of six months' hard labor for the county imposed upon a remandment of the cause, which the court clearly had a right to fix by a resentence, being within the period of limitation as to time prescribed by

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that section, the sentence pronounced must be held to be correct.

**Affirmed.**

HARALSON, DOWDELL, SIMPSON, and DENSON, JJ., concur.

ANDERSON, J. (dissenting.)—I cannot consent to hold, that the indictment in this case comes under section 4707 of the Code of 1896, for to so hold, simply reads something into the indictment or statute that is not there. The indictment charges an attempt to escape from jail, while said section provides only for escapes from the penitentiary, the hirer, or person or guard having the convict in charge.

MCCLELLAN, J., joins in this dissent.

## Williams v. The State.

### *Assault With Intent to Murder.*

(Decided April 18, 1907. 43 So. Rep. 720.)

1. *Witness; Competency; Husband and Wife; Offense Against the Person of One or the Other.*—The husband is a competent witness against the wife under a charge of assault with intent to murder the husband.
2. *Evidence; Secondary Evidence; Writings Collateral to Issue.*—It was not incompetent to permit a witness to testify that he had been divorced from the defendant, who was under prosecution for an assault with intent to murder witness, on the ground that the decree of divorce was the best evidence, as the matter of divorce was a mere collateral incident to the matter at issue.
3. *Same; Opinion Evidence; Identity.*—Where the evidence tended to show that accused shot at witness from the outside of the house through the window and immediately ran off, it was competent for the witness to testify "that from what he saw

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and in his best judgment it was the defendant who did the shooting."

4. *Criminal Law; Trial; Jury Question*.—Where the evidence tended to show that the defendant shot at the prosecutor from the outside of his house through the window, the question of whether defendant was guilty of assault with intent to murder was properly submitted to the jury.
5. *Same; Instructions; Effect of Evidence*.—A charge which asserted that unless there was other evidence than that of the person assaulted, to convince them beyond a reasonable doubt that the defendant committed the offense they could not convict the defendant and should not find her guilty, is a charge upon the effect of evidence and is properly refused.

APPEAL from Marengo Circuit Court.

Heard before Hon. JOHN T. LACKLAND.

The defendant was charged with assault with intent to murder one Johnson. It appears from the evidence that the defendant and the person assaulted were once husband and wife. The other facts sufficiently appear in the opinion. The court refused to give the defendant the following written charges: (1) General affirmative charge, with hypothesis. (2) "The court charges the jury that unless there is other evidence in this case, save that of Lewis Johnson, which convinces you beyond a reasonable doubt that the defendant committed the offense with which she is charged, you cannot convict the defendant, and your verdict should be not guilty." The defendant was convicted, and sentenced to five years in the penitentiary.

CANTERBURY & GILDER, for appellant.—The marital relation is presumed to continue when once shown to exist.—1 Greenleaf Evidence (16th Ed.) Sec. 42; *Evans v. Horton*, 93 Ala. 329. As to how marriage may be shown see 1 Greenleaf on Evidence (16th Ed.) sec. 140. Neither husband nor wife can testify one against the other.. Same author, sections 334-335. They cannot testify after divorce.—*State v. Raby*, 20 S. C. 490. The record of the proceedings in chancery was the best evidence of the divorce.

ALEXANDER M. GARBER, Attorney General, for State.  
—Husband and wife can testify against one another in

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cases of this character.—*Long v. The State*, 86 Ala. 36. The evidence of the divorce was merely secondary or collateral and it was not necessary to produce the highest and best evidence.—*Allen v. The State*, 79 Ala. 34; *Forworth v. Brown*, 120 Ala. 69; *Griffin v. The State*, 129 Ala. 92; *Husky v. The State*, 129 Ala. 94. The court did not err with reference to the witness Johnson's testimony.—*Thornton v. The State*, 113 Ala. 43. The court rightly refused the two charges requested by the defendant.—*Long v. The State*, *supra*; 15 A. & E. Ency. of Law, (2nd Ed.) 902.

HARALSON, J.—In any criminal proceeding against the husband or wife, for any bodily injury or violence inflicted by the one upon the other, the wife or husband is competent and compellable to testify.—*Johnson v. State*, 94 Ala. 54, 10 South. 427, and authorities there cited; 7 A. & E. Ency. Law (1st Ed.) 102; 30 A. & E. Ency. Law, (2nd Ed.) 955.

In all manner of offenses involving injury, the wife has always been allowed to testify directly against her husband, and where the husband is the injured party, he may testify against the wife. This comes as a matter of necessity, otherwise the crime might go unpunished. 30 A. & E. E. L. (2d Ed.) 954; 15 A. & E. E. L. (2d Ed.) 904.

The general rule is to exclude the husband or wife in civil or criminal cases, in which the other is a party.—1 Gr. Ev. 334. To this rule there are, however, exceptions, found stated by Mr. Greenleaf in the same volume (section 343.) He then states: "So, she is a competent witness against him in an indictment for rape committed on her person; and for an assault and battery upon her; or for maliciously shooting her. \* \* \* Indeed, Mr. East considered it to be settled, that 'in all cases of personal injuries committed by the husband or wife against each other, the injured party is an admissible witness against the other.'"

The witness, Johnson, was permitted to state, that the defendant had been his wife, but that they had been divorced. The defendant moved to exclude that part of his answer, "but we have been divorced," on the ground,

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that the decree of divorce, was higher and better evidence of the fact of divorce. But this, if important, was a collateral matter, not immediately affecting their mutual interests in this prosecution, but simply proof of an incidental or collateral fact.—1 Gr. Ev. §§ 342, 89; *Griffin v. State*, 129 Ala. 92, 29 South. 783; *Allen v. State*, 79 Ala. 34, 39.

This witness was also properly permitted to state, "that from what he saw, and in his best judgment, it was the defendant" who did the shooting.—*Thornton v. State*, 113 Ala. 44, 21 South. 356, 59 Am. St. Rep. 97.

He testified that he had married a second time; that he had been married not quite a week, when this occurrence of shooting through his window took place, and that defendant, a few days before, had made threats and stated to him, "that if he married that woman, it should never do him any good."

The evidence for the state, tended to show, that the defendant shot at the witness, Johnson, her former husband, from the outside, through the window of his house, and immediately ran off.

The defendant testified that she did not do the shooting, and had no cause or ground for doing so. Her counsel asked her, if she had been divorced from the witness, Johnson, and she answered, "Yes, I give him a divorce."

The two charges requested by defendant, were properly refused.

No error appearing, the judgment and sentence below are affirmed.

Affirmed.

TYSON, C. J., and SIMPSON and DENSON, JJ., concur.

[Creagh v. The State.]

**Creagh v. The State.***Murder.*

(Decided Feb. 14th, 1907. 43 So. Rep. 112.)

1. *Criminal Law; Instructions Covered by Instructions Given.*—It is not error to refuse instructions which are substantially covered by requested instructions already given.
2. *Same; Reasonable Doubt.*—A well founded doubt is the same as a reasonable doubt.
3. *Homicide; Instructions; Imminent Danger.*—A charge asserting that if the jury believe from the evidence that the defendant was being attacked by E. with a bar of iron, and that he was attacked by deceased with a razor, without fault on defendant's part, or that he was attacked by deceased while he was being assaulted with a deadly weapon by another, then the jury must acquit him, failing to hypothesize imminence of danger to life or limb, was erroneous and properly refused.
4. *Same; Degree of Offense; Sufficiency of Instruction.*—An instruction asserting that if the jury believe from the evidence that the killing grew out of a difficulty that started in the house after defendant went into the house, or that the killing grew out of a difficulty that started in the house, then they could not find defendant guilty of any offense higher than manslaughter, pretermittting all inquiry as to who brought on the difficulty that led to the killing, was erroneous and its refusal proper.
5. *Criminal Law; Trial; Instructions; Province of Court and Jury.*—It is not error to refuse to instruct the jury that they could consistently reconcile the statements of certain witnesses, as to confessions made by defendant to them that he cut deceased, with his innocence, as it is invasive of the province of the jury.

APPEAL from Clarke Circuit Court.

Heard before Hon. S. H. SPROTT.

The defendant was indicted, tried, and convicted for killing Callie Cleveland by cutting her with a knife or other sharp instrument to the grand jury unknown. The evidence for the prosecution tended to show that early one morning in the year 1904 the deceased was at the

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house of defendant, and that she left there with her throat cut from ear to ear, from the effects of which she died a few minutes after reaching home; that deceased went to defendant's house early that morning, and while there a difficulty occurred between defendant and another woman, Evaline Jones, a sister of deceased, and in the difficulty deceased was cut by defendant. Evaline Jones testified that she and deceased were at defendant's house, where witness lived, and that in a difficulty between witness and defendant witness was cut in three places by defendant, and that after she was cut she picked up an iron rod, but did not know whether she threw it at defendant in the house or out in the yard, where it was found. There was evidence of confessions made by the defendant that he cut deceased, and that she and Evaline Jones were attacking him with a rod of iron and a razor when he did the cutting. There was also evidence of flight of defendant. It was shown that no marks or other signs of a cut were seen on the clothes defendant said he had on at the time of the difficulty. The evidence for the defendant tended to show that the women came over to his house, and that Evaline Jones began to take the clothes off his bed, when he attempted to stop her, and she attacked him with a rod of iron, and hit him several times, whereupon he took up a knife off of the table and cut her, and then deceased attacked him with a razor, cutting him about the arm and back, and that he threw back his arm with the knife in his hand, but, if he cut deceased, he did not know it.

The following charges were requested by the defendant, and refused by the court: "(2) The court charges you, gentlemen of the jury, that if the evidence, or any part thereof, after a consideration of the whole of such evidence, generates a well-founded doubt of the defendant's guilt, the jury must find defendant not guilty. (a) The court charges the jury that if they believe from the evidence that at the time of the killing the defendant was being attacked by Evaline Jones with a bar of iron, and that he was not at fault in bringing on the difficulty, then you must acquit him. (3) If the jury believe from the evidence that the defendant, without fault on his part, was being at-

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tacked by Evaline Jones with a bar of iron, and that deceased attacked him with a razor, then you must acquit him. (4) The court charges the jury that if they believe from the evidence that the defendant was being attacked by Evaline Jones with a bar of iron, without fault on his part, and the deceased went in and joined in the attack, then you must acquit the defendant. (5) If the defendant was free from fault in bringing on the difficulty, and the deceased voluntarily attacked him while he was being assaulted with a deadly weapon by another, then you must acquit him. \* \* \* (7) If the jury believe from the evidence that the killing grew out of a difficulty that started in the house, after the defendant went into the house after speaking to Charlie Daniel in the yard, then you cannot find him guilty of any higher offense than manslaughter. (8) If the jury believe from the evidence that the killing grew out of a difficulty that started in the house, then you cannot find him guilty of any offense higher than manslaughter. \* \* \* (11) The court charges the jury that they can consistently reconcile the statement of the witnesses Marshall and Jewett, as to the confession made by the defendant to them that he cut the deceased, with the defendant's innocence."

Defendant was convicted of murder in the second degree, and sentenced to imprisonment in the penitentiary for a term of 25 years.

W. D. DUNN, and WILSON & ALDRIDGE, for appellant.  
—No brief came to the reporter.

MASSEY WILSON, Attorney General, for State.—Charge 2 is substantially the same as given charge 3. A well founded doubt is a reasonable doubt. Charge 2A, 3 and 4 are criticized but no authorities cited. Charge 5 fails to hypothesize ability to retreat and necessity to kill.—*Mitchell v. The State*, 133 Ala. 65. The Attorney General criticizes the other charges but cites no authority.



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HARAI:SON, J.—The only questions presented, arose out of the refusal by the court to give certain written charges.

Charge 2 was not improperly refused. It is substantially the same as given charge 3. A well founded doubt is the same as reasonable doubt.—*Turner v. State*, 124 Ala. 59, 27 South. 272; *Stewart v. State*, 133 Ala. 109, 31 South. 944.

Charges 3, 4 and 5 are bad. They fail to hypothesize imminent danger to life or limb.

From aught appearing in charges 7 and 8, the defendant may have brought on the difficulty that led to the killing.

Charge 11 invades the province of the jury, in that it instructs the jury "that they can consistently reconcile the statement of the witnesses Marshall and Jewett."

There was no room for the general charge for defendant. There was evidence tending to prove every element of the offense charged. No error appears.

Affirmed.

TYSON, C. J., and SIMPSON and DENSON, JJ., concur.

## Logan v. The State.

### *Murder.*

(Decided Feb. 7th, 1907. 43 So. Rep. 10.)

1. *Grand Jury; Authority to Select; De facto Commissioners.*—The two commissioners who drew the grand jury each held commissions to their office at the time they drew the grand jury, and they were de facto officers and their acts valid, although they were subsequently ousted from office.
2. *Homicide; Evidence; Dying Declaration; Predicate.*—A sufficient predicate was laid for the admissions of dying declarations where it was shown that deceased said that he could not get well, but was going to die, and wanted to be at home when he died.

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3. *Criminal Law; Appeal; Matter not Presented in Lower Court.*—The minute entry showed that the grand jury was composed of fifteen persons, but names only fourteen. The defendant in the lower court moved to quash the venire on the grounds other than want of sufficient number of grand jurors. Held, that the objections for want of proper number of grand jurors cannot be raised for the first time in the appellate court, and that the appellate court will presume that the grand jury was legally constituted.
4. *Homicide; Evidence; Previous Difficulty.*—The defendant cannot testify as to the particulars of a previous difficulty between him and deceased, where the state has not shown a previous difficulty.
5. *Same; Trial; Instructions; Invading Province of Jury.*—The charge asserting that if the jury believed beyond a reasonable doubt that the defendant cursed deceased and said to him he was going to kill him, and defendant said this as soon as deceased came in sight of him the evening of the shooting, and that defendant immediately after using the language shot deceased, then the defendant could not be acquitted under plea of self defense, is not error as invasive of the province of the jury. (DOWDELL, ANDERSON and DENSON, JJ., dissent to this proposition.)

APPEAL from Fayette Circuit Court.

Heard before Hon. S. H. SPROTT.

The defendant was indicted for murder in the first degree, tried, convicted of murder in the second degree, and sentenced to the penitentiary. He entered a motion to quash the indictment because preferred by a grand jury drawn by persons not authorized by law to draw grand juries. The motion was based on the fact that since the drawing of the grand jury two of the commissioners who were present and assisted in the drawing had been ousted from that office by quo warranto proceedings. It was further shown that at the time of the drawing of the jury they each were acting by virtue of a commission issued to them from the proper legal authorities.

The predicate laid for the introduction of the dying declarations was as follows: Two witnesses reached him soon after he was shot, and he said to them that he was shot, and could not get well, and was going to die, and asked to be gotten home as soon as possible, that he

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might be there when he died ; that he knew he was going to die, and could never get well. When the defendant was upon the stand as a witness the defendant offered to show that he had had a previous difficulty with deceased, and afterwards to go into the details of the difficulty. This latter evidence the court sustained an objection to.

The opinion is full as to the objection to the grand jury on account of being composed of less than 15 members.

Charge 2 is as follows: "The court charges the jury that if they believe from the evidence in this case, beyond a reasonable doubt, that the defendant cursed Sam Duncan, and told Duncan he was going to kill him, and this was said by defendant as soon as Duncan came into sight of him the evening of the shooting, and, further, that the defendant, immediately after using this language, shot Sam Duncan, then the defendant could not be acquitted on the plea of self-defense."

J. J. MAYFIELD, for appellant.—The indictment upon which the defendant was tried affirmatively appears by an inspection of the record to be a nullity and this court must proceed to render such judgment on the record as the law demands.—*Fenley v. The State*, 61 Ala. 201; *O'Byrnes v. The State*, 61 Ala. 25. It affirmatively appears that only 14 appeared and answered and it thus affirmatively appears that the grand jury was constituted in violation of the statute.—Authorities supra; *Hall v. The State*, 134 Ala. 90; *Peters v. The State*, 98 Ala. 38; *Ramsey v. The State*, 113 Ala. 49; *Parmer v. The State*, 41 Ala. 416; *Fowler v. The State*, 100 Ala. 96. The court erred in overruling defendant's motion to quash the indictment because the grand jury finding it was not drawn by or in the presence of the officers required thereto by law. The court erred in refusing to allow the defendant to show by the witness Freeman that the deceased had waylaid the defendant or had eavesdropped the house of his neighbor Adams, while defendant was there.—*Fincher v. The State*, 58 Ala. 215; *Gafford v. The State*, 122 Ala. 52. The court erred in giving charge 2 for the state. When the defendant has

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established a present pressing necessity to take life the onus is on the state to show that he was at fault in provoking or bringing on the difficulty.—*Gibson v. The State*, 89 Ala. 121. To establish the plea of self defense the defendant is only required to show that at the time he was actually or to ordinary reasonable appearance in imminent peril of life or limb.—*Keith v. The State*, 97 Ala. 32. The burden of proof is never on the defendant to show that he did not provoke the difficulty.—*Hinson v. The State*, 112 Ala. 41.

MASSEY WILSON, Attorney General, for State. No brief came to the reporter.

DOWDELL, J.—The commissioners H. Brown and W. M. Wright, who acted with the jury commissioners that drew the grand jury which found and returned the indictment against the defendant, were commissioners de facto, if not commissioners de jure. They each at the time held a commission of office regularly issued to each of them as such commissioners, and the fact that they were, subsequent to the time of the drawing of the jury in question, ousted of the office of commissioner on quo warranto proceedings against them, is of no importance. They each, while acting as commissioners in the drawing of the jury, acted under color of office, and were therefore de facto commissioners.—*Cary v. State*, 76 Ala. 78; *Spraggins v. State*, 139 Ala. 93, 35 South. 1000. The rule is well settled that the official acts of an officer de facto are just as valid for all purposes as those of an officer de jure, so far as the public and third persons are concerned.—*Cary v. State*, *supra*; *Joseph v. Carthorn*, 74 Ala. 411, and cases there cited.

The predicate for the admission of evidence of dying declarations was sufficient, and no error was committed in overruling the defendant's objections to this evidence.

There was no error in sustaining the objection of the state to evidence by the defendant, when testifying as a witness in his own behalf, as to the particulars of a previous difficulty between the defendant and the deceased.

It is urged here that the grand jury which returned the indictment was an illegal grand jury, in that the

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record shows that, as organized, it was composed of only 14 persons. No such objection was made to the indictment in the court below. There is a conflict in statement in the minute entry relating to the organization of the grand jury, as appears from the transcript here. The minute entry affirmatively states that the grand jury, as organized by the court, consisted of 15 persons, but sets out the names of only 14. Motion was made in the court below to quash the indictment on other grounds, and it is reasonable to presume, if the fact had existed that the grand jury was composed of only 14, motion would have been made to quash on that ground. In such a case we will presume, in favor of the affirmative statement in the judgment, that the grand jury as organized was composed of 15, and that the failure to state the name of the fifteenth person was a clerical omission in making up the transcript for this court.

Charge 2, given at the request of the solicitor, was invasive of the province of the jury, and therefore erroneous. Every fact hypothesized in the charge might have been believed by the jury, and yet, under the evidence set out in the record, it was open for the jury to find that the defendant acted in self-defense. If, when the defendant first came in sight of the deceased, the latter made such demonstration as would reasonably impress the defendant, and did so reasonably impress him, with the honest belief that he was in peril of his life or great bodily harm, and there was no reasonable mode of retreat or escape, and if the defendant was free from fault in bringing on the difficulty, and did not encourage or willingly enter into it, then he would not be deprived of his plea of self-defense, although he might have cursed the deceased and said he would kill him. The facts hypothesized in the charge may have been sufficient to convince the jury that the defendant was not free from fault, and, therefore, could claim nothing under the plea of self-defense; but it was for the jury's consideration, and for them to say, and not for the court to say as a matter of law. Under the evidence the jury might have found that the facts hypothesized in the charge were subsequent in point of time to the threatening demonstrations of the deceased. The charge, when analyzed,

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asserts in effect as matter of law that, notwithstanding all of the constituent elements of self-defense may have existed, yet if the defendant cursed his adversary and declared he would kill him, and immediately shot him, he would thereby be deprived of his plea of self-defense.

Justices ANDERSON and DENSON concur with the writer in the foregoing views. Chief Justice TYSON and Justices HARALSON, SIMPSON, and McCLELLAN, constituting a majority of the court, hold that charge 2 correctly stated the law and that no error was committed in giving it. The judgment appealed from must therefore be affirmed.

Affirmed.

TYSON, C. J., and HARALSON, SIMPSON, and McCLELLAN, JJ., concur.

DOWDELL, ANDERSON, and DENSON, JJ., dissent.

## Young v. The State.

### *Murder.*

(Decided Feb. 14th, 1907. 43 So. Rep. 100.)

1. *Jury; Special Venre; Serving List; Motion to Quash.*—Nine of the special jurors drawn for defendant's trial were not summoned, but their names appeared on a list served upon defendant. Held, no grounds for quashing the venire.
2. *Same.*—Although fifteen of the jurors drawn upon the special venire and served upon defendant did not appear, and their absence was not explained and the court did not enter forfeitures against them, it furnished no grounds for quashing the venire.
3. *Homicide; Evidence; Jury Question.*—Under the evidence in this case it was a question for the jury whether the defendant was guilty of murder.
4. *Criminal Law; Murder; Evidence; Res Gestate.*—It was shown that defendant and others had been gambling, that defendant had lost and was ill-tempered, that decedent threw straw upon

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the fire which blazed up suddenly against defendant, all a short time before the shooting. Held, competent as part of the *res gestae*, and as illustrating the frame of mind of defendant at or about the time of the shooting, especially where the defense was that the shooting was accidental.

5. *Same.*—The declarations of a by stander, "Come back, It was an accident!" are admissible as part of the *res gestae*, and as showing the conduct and demeanor of the defendant at or about the time of the shooting especially as defendant returned in response thereto.
6. *Same.*—*Instructions Covered by Instructions Given.*—It is not error to refuse an instruction covered by an instruction given.

APPEAL from Covington Circuit Court.

Heard before Hon. A. H. PEARCE.

The defendant was indicted and tried for killing Dave Bell by shooting him with a pistol. The errors assigned as to the refusal of the court to quash the special venire sufficiently appear in the opinion. The evidence tended to show that defendant and deceased and some others were engaged in a game of cards just before the shooting took place, and that some were playing at the time of the shooting; that defendant and deceased were standing up near the fire, and the rest of them were a few steps away; that just before the shooting the defendant had been playing with the crowd and had lost all his money, and that he was mad and enraged, and grabbed up the cards from the ground and said he was a great mind to shoot through them; that the fire was about out, and Dave Bell gathered up some straw and threw it on the fire; that defendant was standing near, when the fire suddenly blazed up and ran up his back. Some one said, "Look out! Bishop." Bishop kicked the fire, and at the same time threw his arm across his shoulder, turned about half around, and fired in the direction of Dave Bell, and the shot entered Bell's head and he fell to the ground. The witness was then permitted to testify that all the crowd, except Alf White, ran off a few steps, the defendant going with them, when Alf White said, "Come back! it was an accident," and the defendant and the others came back. Other witnesses testified substantially to the same facts. The defendant's evidence tend-

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ed to show that it was an accidental shot. The defendant requested the following charges, which were refused: Charge 22. General affirmative charge. Charge 4. "The court charges the jury that, unless the evidence against the defendant should be such as to exclude to a moral certainty every hypothesis or supposition but that of his guilt, or of the offense imputed to him, the jury must not convict the defendant." Charge 3. "The burden of proof in every criminal case is on the state to prove all the allegation in the indictment; and if, on the whole evidence, the jury have a reasonable doubt whether the defendant is guilty of the crime that is charged, they should acquit him." unnumbered charge. "If the evidence leads to a reasonable doubt, that doubt will avail in favor of the prisoner." Defendant was adjudged guilty of murder in the first degree and sentenced to life imprisonment.

No counsel marked for appellant.

ALEXNADER M. GARBER, Attorney General, for State. The court rightly overruled the motion to quash the venire.—*Gregory v. The State*, 140 Ala. 16; *Barnes v. The State*, 134 Ala. 36. The statement of White was part of the *res gestae* and admissible as such. All the evidence was properly admitted as part of the *res gestae*.—*Nordan v. The State*, 143 Ala. 13; *Nelson v. The State*, 130 Ala. 83; *Stephens v. The State*, 138 Ala. 71; *Harbour v. The State*, 140 Ala. 103; *Ferguson v. The State*, 141 Ala. 20. Charge 4 was properly refused.—*Bone v. The State*, 117 Ala. 138. Charge 3 was properly refused.—*Wilson v. The State*, 140 Ala. 42.

DENSON, J.—Before entering on the trial the defendant moved to quash the venire because nine of the special jurors drawn by the presiding judge, and whose names were served on the defendant, were not summoned. It was shown on the hearing of the motion that said jurors could not be found in the county by the sheriff. The motion was properly overruled.—*Barnes' Case*, 134 Ala. 36, 32 South. 670; *Caddell's Case*, 129 Ala. 57, 30 South. 76; *Gregory's Case*, 140 Ala. 16, 37



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South. 259; *Webb's Case*, 100 Ala. 47, 14 South. 865.

The bill of exceptions shows that, in organizing the special jury to try the case, the names of the veniremen were drawn from the box in regular order, and 15 of those drawn, and who were served on the defendant, failed to answer; that they were not present, their absence was not explained, nor did the court enter forfeitures against them. At the conclusion of the impaneling of the jury the defendant moved to quash the venire and strike the jury on account of the absence of the large number of jurors and their unexplained absence. Giving the defendant full benefit of the above recitals, we would say they show the 15 jurors were summoned and did not obey the summons—were not present. This furnished no ground to quash the venire. The law was complied with when summons was served on each juror. No duty rested on the court or the sheriff to do any more. Even if the jurors had been in Andalusia, but out of the courthouse, there is no law or rule of practice in this state which requires that the court should have had them called at the door of the courthouse, or requiring that they should be sent for when their names were called.—*Waller's Case*, 40 Ala. 325. The fact that forfeitures were not entered against the absent jurors does not concern the defendant.

The declarations of Alf White, "Come back! it was an accident," were undoubtedly a part of the *res gestae*, and were properly admitted. Moreover, it appears that the defendant in response to the declarations immediately returned. Thus it was competent as showing or tending to show the conduct and demeanor of the defendant at or about the time of the shooting.—*Henry's Case*, 107 Ala. 22, 19 South. 23; *Nordan's Case*, 143 Ala. 13 (9th head note), 25, 39 South. 406; *Nelson's Case*, 130 Ala. 83, 30 South. 728; *Steven's Case*, 138 Ala. 71, 35 South. 122; *Harbour's Case*, 140 Ala. 103-109, 37 South. 330; *Ferguson's Case*, 141 Ala. 20, 37 South. 448.

The state proved by one of its witnesses that, just before the shooting was done by the defendant, defendant had been playing cards with the crowd, the deceased included, and had lost all of his money; that defendant

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was mad and enraged, and grabbed up the cards from the ground, and said he was a good will to shoot through them. This was a minute or two before the shooting. Aside from the question of *res gestae*, this evidence was competent and relevant as tending to show the conduct and demeanor of the accused—his frame of mind—at or about the time he shot deceased, especially so when the only defense is that the killing was accidental.—*Henry's Case*, 107 Ala. 22, 19 South. 23. Whether or not the defendant was guilty was clearly a question for the jury on the evidence; and charge 22, the general affirmative charge requested by the defendant, was properly refused. Charge 4, refused to the defendant, was properly refused, on the authority of *Bones v. State*, 117 Ala. 138, 23 South. 138. Charge 3 was properly refused, on the authority of *Stoball's Case*, 116 Ala. 454, 23 South. 162; *Wilson's Case*, 140 Ala. 43 (charge 11), 37 South. 93. If it should be conceded that the refused charge, in these words: "If the evidence leads to a reasonable doubt, that doubt will avail in favor of the defendant"—is not defective in form, still the principle sought to be enunciated is covered by the charge in writing given at the request of the defendant: "If the jury have a reasonable doubt of the guilty of the defendant, they should acquit him." The refused charge is a substantial duplicate of the given charge.

We have found no error in the record, and the judgment of conviction is affirmed.

Affirmed.

TYSON, C. J., and HARALSON and SIMPSON, JJ., concur.

[Ferguson v. The State.]

**Ferguson v. The State.***Murder.*

(Decided Feb. 7th, 1907. 43 So. Rep. 16.)

1. *Homicide; Proof of Conspiracy; Admissibility.*—The state relied on the existence of a conspiracy between the son, who did the actual shooting, and the accused to kill deceased, and it was competent to show in support thereof that prior to the killing accused stated that if his son should kill deceased, no more attention would be paid to it than if he killed a dog, and that he and his son were looking for deceased, and wanted to be ready when he came.
2. *Criminal Law; Trial; Instructions.*—Where there was evidence tending to show a conspiracy between the son and the defendant to kill deceased, the general affirmative charge was properly refused to defendant, although there was conflict in the testimony as to the conspiracy.
3. *Same; Appeal; Motion for New Trial; Review.*—This court cannot review the action of the trial court on a motion for a new trial in a criminal case.
4. *Same; Trial Instructions; Ignoring Evidence.*—Where there was evidence tending to show a conspiracy between defendant and his son to commit the homicide, an instruction predicated an acquittal of defendant on a reasonable doubt of his presence aiding and abetting his son, pretermittting, as it does, all reference to a conspiracy, is properly refused.
5. *Same; Instructions; Province of Jury.*—Where the evidence tended to show a conspiracy between the defendant and his son to commit the offense charged, instructions which withdrew from the jury all consideration of the question of conspiracy, are properly refused.
6. *Homicide; Manslaughter; Conspiracy to Commit.*—Parties may enter into conspiracy to commit manslaughter.

APPEAL from St. Clair Circuit Court.

Heard before Hon. JOHN PELHAM.

W. F. Ferguson was convicted of manslaughter in the first degree, and he appeals. The evidence for the state tended to show that, on the afternoon on which the kill-

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ing occurred, Will Andrews and his mother were coming along the public road, approaching the store, dwelling, and barn of the defendant; that before they reached the store John Ferguson, the son of the defendant in this case, who was in defendant's store, got his gun, walked out of the store and up the road towards defendant's home, passed the house and went into the lot and into the stable; that, when Will Andrews was nearly opposite the lot gate, a shot was fired from the stable into which John Ferguson had gone, and that immediately after this shot was fired John Ferguson came out of the stable, went towards the pigpen, and when near the pigpen fired a second shot, which killed the defendant; that after killing him he came out of the lot, passed the dead man and his mother, and went to where his father was standing near the corner of the yard, and on the opposite side of the road, about 75 yards from the lot, where some words passed between him and Mrs. Andrews. The evidence tended to show that, when Mrs. Andrews and Will Andrews approached the store, John Ferguson was showing some customers some shoes, and the defendant in this case was lying on a box of corn with his head towards the door talking to a witness for the state; that the witness mentioned the fact that Will Andrews and his mother were coming towards the store, and immediately thereupon John Ferguson picked up his gun and went out the door, preceding Mrs. Andrews and Will up the road; that as soon as he passed the store this defendant got up out of the box of corn, went out, and closed the store door, whereupon the witness for the state asked him to let him go back in the store and get his hat. The defendant then opened the door and went in the store with the witness, and when he came out the second time he had a pistol in his hand, and went on up the road in the direction which his son had taken, and in the direction in which the dead man had gone. It was further shown that, owing to a rise in the road, one standing where defendant was could not see a person standing at or near the lot gate. It was further shown that the defendant went within 50 or 60 yards of where the killing occurred with his pistol in his hand, and had some conversation with the mother of the dead man.

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The witness Washburn testified that on Monday before the killing, which occurred on Saturday afternoon, the defendant was at witness' house, and in a conversation stated to witness that he had succeeded in getting the trouble between John Ferguson, his son, and Will Andrews settled, until Saturday evening, when the old man came to the store and threw off on John, and made him mad again; that John would not talk to defendant about it now. Defendant further stated that if they pushed the thing on John, and John got into trouble, the defendant had 300 acres of land and would spend it all before John could be hurt, and that, if John were to kill one of them, no more attention would be paid to it than if he had killed a dog. The witness Tolbert testified that on Saturday afternoon, just one week before the killing, he rode up to the defendant's door, whereupon the defendant asked him if he had seen anything of Will Andrews as he came on. Witness replied he saw him up the road, and defendant said, "We are looking for him down here, and want to be ready for him when he comes; that, if we were to kill one of them, it wouldn't be any more than killing a dog."

INZER & MONTGOMERY, for appellant.—Before acts and declarations of one (where conspiracy is relied on for a conviction of the defendant), can be offered in evidence against such other or others the sufficiency of such formed design or purpose to commit the offense a foundation should be laid, by proof addressed to the court *prima facie* to establish the existence of such a conspiracy.—*McAnally v. The State*, 74 Ala. 9; *Williams v. The State*, 81 Ala. 1; *Johnson v. The State*, 87 Ala. 39. The rule is that all offenses admit of accessories except high treason because of the heinousness of the crime; unpremeditated offenses, such as manslaughter, etc., because from the very nature of the case there can be no accessory before the fact; and misdemeanors, because such offenses are too trivial.—*Scott v. The State*, 30 Ala. 503; *Elijah v. The State*, 35 Ala. 428; Clarke's Criminal Law, page 224.

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ALEXANDER M. GARBER, Attorney General, and BORDEN H. BURR, Solicitor of the Seventh Judicial Circuit, for State.—Every question raised by the defendant has already been decided, adversely to him on the former appeals in this case.—*Ferguson v. The State*, 134 Ala. 63 and 141 Ala. 26. There was sufficient evidence to submit the question of conspiracy to the jury.—*Morris v. The State*, 41 So. Rep. 280; *Amos v. The State*, 83 Ala. 4; *Buford v. The State*, 132 Ala. 8; *Knight v. The State*, 41 So. Rep. 734.

McCLELLAN, J.—The case has on two former occasions engaged the attention of this court, and is reported in 134 Ala. 63, 32 South. 760, 92 Am. St. Rep. 17, and 141 Ala. 26, 37 South. 448. The appellant appeals from a judgment of conviction of manslaughter in the first degree. The facts of this offense are shown by this record to be, for present purposes, in substantial accord with those presented on the former appeals, and reiteration is unnecessary. Errors are assigned, and we consider them seriatim.

The first, second, and third assignments are based, in the order stated, upon the action of the trial court in denying defendant's motion to exclude the testimony of witnesses Washburn and Tolbert on the ground, in substance, that it did not tend to show a conspiracy to grievously harm or kill the deceased; in denying defendant's motion to exclude all the testimony offered by the state on the ground that it did not tend to connect defendant with the killing of deceased; and, lastly, in refusing to defendant the affirmative charge. A conspiracy need not be established by direct proof of an express agreement between the conspirators. On the contrary, it may be shown by circumstantial evidence only. Nor is it necessary, to fix criminal responsibility upon co-conspirators participating in a criminal act, that it be committed or done in respect of time or place or manner according to any prearranged plan.—*Ferguson's Case*, *supra*; *Morris' Case*, 146 Ala. 66, 41 So. 280. Here the question of conspiracy vel non between defendant and his son was one for the jury, and the whole evidence introduced, including that of the witnesses Wash-

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burn and Tolbert sought to be excluded by the motions mentioned above, was properly submitted for the consideration of the jury; and, there being testimony tending to establish a conspiracy between the son and defendant, though met in conflict by testimony offered on the part of the defendant, the general affirmative charge for the defendant was well refused by the court.

The eighth assignment is predicated upon the overruling of the motion for a new trial. It has been repeatedly declared that such action, in a criminal case, is not reviewable.—*Thomas v. State*, 139 Ala. 80, 36 South. 734.

Assignments 4, 5, 6, and 7 relate to refused charges requested by defendant. Charge 2 was properly refused, because it predicates acquittal upon reasonable doubt of defendant's presence "aiding and abetting" the actual slayer, and pretermits in the hypothesis all reference to a conspiracy of which there was testimony tending to establish. Charge 4 was well refused, since it declares that there can be no conspiracy to commit manslaughter. This very question was considered and decided adversely to appellant, in 141 Ala. 20, 37 South. 448, on his appeal; and we reaffirm that decision. Charges 7 and 8 were also improper, because they took from the jury the question of conspiracy, and, besides, were invasive of the jury's province.

This disposes of all the assignments of error, and we have further investigated the record and find no error therein. So the judgment of the circuit court is affirmed.

Affirmed.

TYSON, C. J., and DOWDELL and ANDERSON, JJ., concur.

[Nelson v. The State.]

**Nelson v. The State.***Murder.*

(Decided Feb. 7th, 1907. 43 So. Rep. 18.)

1. *Criminal Law; Endorsement of Witness on Indictment; Necessity.*—The fact that a witness' name was not endorsed on the indictment under which defendant was being tried, offers no good ground for objection to his testimony.
2. *Same; Instructions; Review.*—Under Section 3327, Code 1896, this court will not consider instructions where the record fails to show that they were requested in writing, or that they were given or refused.
3. *Homicide; Self Defense; Instructions.*—An instruction predicating an acquittal on impending danger to life or of great bodily harm that does not hypothesize that such reasonable belief therefor had been begotten by the attending circumstances, fairly creating it and honestly entertained by the defendant at the time the fatal shot was fired, is erroneous and properly refused.

APPEAL from Jefferson Criminal Court.

Heard before Hon. D. A. GREENE.

Henrietta Nelson was convicted of homicide and appeals.

No counsel marked for appellant.

MASSEY WILSON, Attorney General, for State.—There is no rule of law or practice requiring that the names of witnesses be put upon the indictment. It is impossible for the court to say whether the several charges were special written charges requested by the defendant or not. Assuming that charge 21 was a special written charge its refusal was not error.—*Mitchell v. The State*, 133 Ala. 55.

McCLELLAN, J.—The defendant, upon her trial,



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objected to the examination of one Nettie Slaughter, a witness introduced by the state, on the ground that the witness' name was not on the copy of the indictment served on defendant. There was no merit in the objection.

From the bill of exceptions it appears that, after the testimony had all been taken, "the defendant asked the court to charge the jury as follows," and then numerous numbered statements, purporting to be special charges, are set out. We are not advised by anything in the record whether the alleged special charges, with one exception, to be mentioned, were requested in writing, nor of the action of the court thereon, whether given or refused. —Code 1896, § 3327; *Henderson's Case*, 137 Ala. 83, 34 South. 828.

Charge (so called) numbered 21, it appears, was partially "read" by the court to the jury, but before completing the reading the court announced that it was bad, and "marked it refused." It is inferable that this charge was in writing, since it was "read," and also that it was refused, in writing, by the court. While it is a matter of very serious doubt whether it is sufficiently shown by the record that the request was written, within the provisions of Code, § 3327, it is clear that the charge, if such, was properly refused, for the reason, among others, that it predicated acquittal of this defendant, in connection with other elements of self-defense hypothesized, upon impending danger of life or of great bodily harm, without stating the qualification that such reasonable belief thereof must have been begotten by the attendant circumstances, fairly creating it and honestly entertained by the defendant, at the time the fatal shot was fired.

There was no error shown in the record, and affirmance must result.

Affirmed.

TYSON, C. J., and DOWDELL and ANDERSON, JJ., concur.

[Wright v. The State.]

**Wright v. The State.***Murder.*

(Decided April 11, 1907. 43 So. Rep. 575.)

*Witnesses; Cross Examination.*—As to whether or not what a witness has stated is true is a question for the jury, and, hence, it is improper to permit a witness to be asked on cross examination if in making a certain statement witness told the truth.

APPEAL from Clarke Circuit Court.

Heard before Hon. JOHN T. LACKLAND.

Sam Wright was convicted of murder in the second degree and appeals. The errors complained of sufficiently appear in the opinion of the court.

No counsel marked for appellant.

ALEXANDER M. GARBER, Attorney General, for state.—No brief came to the reporter.

MCCLELLAN, J.—The appellant, after severance, was convicted of murder in the second degree. The testimony on the part of the state tended to show that appellant, with others, among them one Bob Brown, attacked and beat to prostration one Linehan with sticks or pieces of rails, and one of them, Foster, then shot him to death. A witness for the state, having testified that Brown struck deceased a felling blow with a piece of fence rail, and contradicted herself (the bill states) in reference to the place from which Brown got the rail, was on the cross asked: "When you stated that Bob Brown stepped outside of the road as he came along behind you, you did not tell the truth?" A second question, in substance the same as that quoted, was propounded, and both were disallowed on the state's ob-

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jection. These are the only exceptions appearing in the bill.

Whatever may be the justifiable latitude allowed the cross-examination, or the discretion reposed in the trial court on the cross-examination of witnesses, the above question is intolerable. Whether what a witness has stated is the truth or not, as that verity appears or bears upon the issue submitted, is matter for the jury's decision, and not that of the witness; and in determining which of two statements is the truth, other circumstances and facts were present in the case to which the jury might refer in deciding the truth vel non of the one or the other statement. Besides, if this query were allowable, a conclusion of the witness would be invited.

We discover no error in the record, and the judgment of conviction is affirmed.

TYSON, C. J., and DOWDELL and ANDERSON, JJ., concur.

## Gains v. The State.

### *Stealing Ride on Train.*

(Decided Feb. 7th, 1907. 43 So. Rep. 137.)

1. *Criminal Law; Appeal; Questions Presented for Review.*—In the absence of a recital in the record proper of the court's action on the demurrers, the statement in the bill of exceptions that the court overruled the demurrers does not present such action for review.
2. *Same; Reserving Exceptions to Charges.*—The bill of exceptions recites that appellant requested four charges and sets them out, and then recites that the defendant duly excepted to the refusal of the court to give them. Held, a request in bulk and not available if any one charge is bad.
3. *Unlawfully Riding on Train; Evidence.*—Evidence in this case held sufficient to authorize a conviction for unlawfully being

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on train without consent of train operators with intent to be transported free.

4. *Criminal Law; Evidence; Burden of Proof; Negative Averments.*

The burden of proving the negative averments of the affidavit that the person was not in the employment of the railroad and that he was riding without authority from the conductor or engineer is not upon the state, such facts being particularly within the knowledge of the defendant.

APPEAL from Shelby County Court.

Heard before Hon. A. P. LONGSHORE.

This prosecution was commenced by affidavit, which charged that Ben Gains, a person not an employe in the discharge of his duty, and without authority from the conductor of the train or by permission of the engineer, and with the intention of being transported free and without paying the usual fare for such transportation, did ride on the top of a Louisville & Nashville railroad car, or a freight car on the Louisville & Nashville railroad. The warrant charging this offense was issued on this affidavit. The cause was tried on affidavit and warrant in the Shelby county court. The evidence showed that on or about the 13th day of March, 1906, in the town of Calera, the marshal of the town saw the defendant on top of an open box car on the Louisville & Nashville railroad, about 150 yards below the station at Calera. At the time he was arrested he had just jumped down off of the train, which was moving slowly. When first seen, he was on a box car, with one leg hanging on the inside of the car and the other out. The time was somewhere between 9 and 10 o'clock at night. When the marshall got within ten or 12 steps of him, the defendant jumped down off the train and was caught and locked up. This was all the evidence for the state, and the defendant introduced none, but asked for the general affirmative charge. The defendant asked other charges, in substance, that the burden of proof is on the state to prove beyond reasonable doubt that, at the time he was riding, he was not an employe of the road and in the discharge of his duty; that he was riding on the train without the permission and consent of the conductor or engineer in charge of the train; that the state must show

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that at the time he was riding he had not paid his fare—all of which charges were refused. Defendant was convicted and fined.

No counsel marked for appellant.

ALEXANDER M. GARBER, Attorney General, for State.—The demurrer cannot be considered because not shown in the record proper nor is the action of the court shown thereon by the judgment entry.—*Broadhead v. The State*, 40 So. Rep. 216; *McQueen v. The State*, 138 Ala. 63. The second alternative was good and the judgment of conviction will be referred to the good count.—*Hornsby v. The State*, 94 Ala. 55; *Handy v. The State*, 121 Ala. 15. The charges were requested in bulk and if any are bad all are properly refused.—*Johnson v. The State*, 141 Ala. 37. The bill of exceptions is construed most strongly against the pleader.—*Moore v. The State*, 40 So. Rep. 345; *Dickens v. The State*, 39 So. Rep. 14. If it be conceded that the burden was upon the state to show that the defendant was not within any of the exceptions mentioned in the statute the tendencies of the evidence were sufficient to submit that question to the jury.—*Hall v. The State*, 40 Ala. 698; *Carden v. The State*, 84 Ala. 417; *Barker v. The State*, 126 Ala. 69. The rule is that where the subject matter of the negative averment lies particularly within the knowledge of the other party the averment is taken as true unless disproved by that party.—*Farrell v. The State*, 32 Ala. 557; *Haney v. Connolly*, 57 Ala. 179; *Freiberg v. The State*, 94 Ala. 91.

DOWDELL, J.—The bill of exceptions recites that a demurrer was overruled to the affidavit. The record does not show any demurrer or ruling thereon by the court, otherwise than by the recital in the bill of exceptions. This is insufficient to present the question for review on appeal.—*McQueen v. State*, 138 Ala. 63, 35 South. 39; *Broadhead v. State*, (Ala.) 40 South 216, and cases there cited.

## [Taylor v. The State.]

The bill of exceptions recites that "the defendant asked the court in writing to give the jury the following charges," and then follows charges numbered from 1 to 4, inclusive, and concludes: "The above written charges requested by the defendant to be given to the jury, and refused by the court. The defendant duly excepts and reserves the same for the consideration of the Supreme Court." The request was general, and, unless all of the charges were good and should have been given, the exception is unavailing.—*Johnson v. State*, 141 Ala. 37, 37 South. 456, and cases there cited. Charge No. 1 was the general affirmative charge to find the defendant not guilty. There was sufficient evidence from which the jury were authorized to find him guilty.

On the authority of *Farrall v. State*, 32 Ala. 557, and *Freiberg v. State*, 94 Ala. 91, 10 South. 703, and the reasons there stated, the burden of proof was not on the state to prove the negative averment in the affidavit. This was matter of defense particularly within the knowledge of the defendant.

We find no error in the record, and the judgment will be affirmed.

Affirmed.

TYSON, C. J., and HARALSON and SIMPSON, JJ., concur.

## Taylor v. The State.

### *Perjury.*

(Decided Jan. 22, 1907. 42 So. Rep. 996.)

*Criminal Law; Instructions; Character of Accused.*—A charge asserting that defendant may offer proof of his good character, and that such proof taken in connection with all the evidence in the case, may be sufficient to create a reasonable doubt of the guilt of the defendant; and one asserting that proof of good character, in connection with all the other evidence, may gen-

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erate a reasonable doubt, which entitled the defendant to an acquittal, even though without such proof of good character the jury would convict; both state correct propositions of law, and their refusal was error.

APPEAL from Conecuh Circuit Court.

Heard before Hon. J. C. RICHARDSON.

The defendant was indicted, tried, and convicted on the charge of perjury. The evidence was in conflict as to whether or not the defendant gave the testimony that the indictment alleges he gave, and as to whether or not it was true or false. At the conclusion of the testimony the defendant requested the following charges, which the court refused to give: Charge 2: "The court charges the jury that the defendant may offer proof of his good character, and that such proof, taken in connection with all the evidence in the case, may be sufficient to create a reasonable doubt of the guilt of the defendant." Charge 3: "The court charges the jury that proof of good character, in connection with all the other evidence, may generate a reasonable doubt, which entitles the defendant to an acquittal, even though without such proof of good character the jury would convict."

C. S. RABB, for appellant. Charge 2 requested by the defendant should have been given.—*Goldsmith v. The State*, 105 Ala. 8; *Scott v. The State*, 105 Ala. 57; *Webb v. The State*, 106 Ala. 52; *Crawford v. The State*, 112 Ala. 1; *Miller v. The State*, 107 Ala. 40. The 3rd charge should have been given.—*Carson v. The State*, 50 Ala. 135; *Armour v. The State*, 63 Ala. 173. The charge as to good character should have been given.—*Bryant v. The State*, 116 Ala. 445.

MASSEY WILSON, Attorney-General, for State. No brief came to the reporter.

SIMPSON, J.—The defendant was convicted of the offense of perjury, and sentenced to five years in the penitentiary. There was evidence tending to show the good character of the defendant, and charge 2, requested by the defendant, is a correct statement of the law; hence

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the court erred in refusing to give the same.—*Goldsmith v. The State*, 105 Ala. 8, 16 South. 933; *Miller v. State*, 107 Ala. 40, 59, 19 South. 37; *Newsom v. State*, 107 Ala. 134, 135, 138, 139, 18 South. 206; *Bryant v. State*, 116 Ala. 446, 448, 452, 23 South. 40.

Charge 3, requested by the defendant, should have been given.—*Bryant v. State*, 116 Ala. 446, 23 South. 40.

The judgment of the court is reversed, and the cause remanded.

TYSON, C. J., and HARALSON and DENSON, JJ., concur.

## Dean v. The State.

*Violating Section 5368, Code of 1896.*

(Decided Feb. 7th, 1907. 43 So. Rep. 24.)

1. *Street Railroads; Operation; Regulation.*—Section 5368, Code 1896, does not apply to a street railway.
2. *Criminal Law; Appeal; Presumption.*—Where it appeared that the railroad was being operated by a street railway company, and there was no affirmative evidence to the contrary, it will be presumed on appeal that the road was a street railway, and that the prosecution under the statute, was not within the terms of the statute.

APPEAL from Bessemer City Court.

Heard before Hon WILLIAM JACKSON.

Louis R. Dean was convicted of a violation of Code 1896, § 5368, making it an offense for the conductor of a railroad train to fail to keep a sufficiency of good drinking water thereon, and he appeals.

THOMAS T. HUEY, for appellant.—A violation of this statute, section 5368, is purely a statutory offense and the indictment must follow the language of the statute. *Miles v. The State*, 94 Ala. 106; *Agee v. The State*, 25 Ala. 67; *Giles v. The State*, 89 Ala. 50. The evidence in this case does not bring the defendant within the grade



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of conductors as provided by the statute. A street railway is not a railway in the sense used by the statute.—27 A. & E. Ency. of Law, p. 5; *Cedar Rapids R. R. Co. v. Cedar Rapids*, 106 Ia. 476; *Williams v. City Electric Street R. R. Co.*, 41 Fed. 556; *Newell v. Minneapolis R. R. Co.*, 35 Minn. 112; *Cincinnati Electric Street Ry. Co. v. Cincinnati, etc., R. R. Co.*, 12 Ohio Cir. 112; Nellis on Street Railways, page 6.

MASSEY WILSON, Attorney-General, for State.—Defendant was properly convicted.—*L. & N. R. R. Co. v. Anchors*, 114 Ala. 494; *Birmingham Mineral R. R. Co. v. Jacobs*, 92 Ala. 187.

ANDERSON,—J. The defendant was indicted and convicted under section 5368 of the Code of 1896, which reads as follows: "Railroad companies must keep good lights on their night trains, and a sufficiency of good drinking water on all trains; and every conductor, who runs any train without lights or water, as required by this section, must, on conviction, be fined not less than one hundred, nor more than five hundred dollars." This section was enacted for the purpose of giving force and effect to section 3456 of the Code of 1896, and which reads as follows: "Every railroad company shall keep good lights on night trains, and on all trains sufficient fresh drinking water"—and which was intended for the comfort and convenience of passengers.

The facts are not such as to enable us to determine whether or not the line upon which the cars were operated is technically a street railway, or what is commonly known as a "railway," and which point it is unnecessary for us to decide, as the pivotal point is whether or not the defendant was the conductor upon such a train as is contemplated by the terms of the statute above quoted. It may be that the cars as described, one motor car and a trailer, would be technically termed a "train," whether operated on a street or other railway, and that many of the statutes governing railroads would be applicable to the company for which the defendant was working; but this court has said, in speaking through Justice COLEMAN, in the case of *Birmingham Min. R. R. Co. v. Ja-*

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*cobs*, 92 Ala. 187, 9 South. 320, 12 L. R. A. 830. "There are many sections in the Code applicable to railroads which do not and were not intended to apply to street railways." Whether the general law is applicable to this case must be determined from the purpose and intent of the statute.—*Nellis on St. R. R.*, p. 6. The cars in question, while operated between Birmingham and Bessemer, a distance of 14 miles, were ordinary electric cars, such as are used on street railways, and seem to have been operated as such, notwithstanding other cars sometimes hauled freight over the line. The proof shows that the cars left the station every half hour, and took on and landed passengers anywhere along the line. Can it be urged with any degree of common sense that a passenger would suffer or be inconvenienced from not being supplied with drinking water during the time it would ordinarily take for these cars to make a trip? We think not, and that the cars upon which the defendant was conductor were not such a train as is contemplated by the criminal statute.

We are not unmindful of what was held in the case of *L. & N. R. R. Co. v. Anchors*, 114 Ala. 492, 22 South. 279, 62 Am. St. Rep. 116. There it was held that the statute requiring trains to stop at crossings applied to cars operated by electricity, for the reason that people travelling upon such cars were entitled to the same protection against collisions at crossings as those traveling on ordinary railroads operated by steam; a wise holding, as the stopping of cars at crossings, regardless of the kind or how operated, would tend to prevent collisions and thus protect human life. In the case at bar it would almost be a legal absurdity to hold that drinking water on these cars is essential to the health, comfort, or convenience of passengers. We think that this statute was intended to apply to such trains as were known at the time of its first enactment, when electric street or suburban cars were unknown; trains upon which people journeyed or traveled, and not cars making frequent trips during the day, connecting points not remote or far distant, and used by people daily and oftener as a means of getting to or from their place of business, or

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for transacting business in close and convenient localities.

My brothers while concurring in the reversal of the judgment, place their concurrence upon the proposition that the testimony is wholly insufficient to support the conviction. It does not appear by that measure of proof required that the railroad upon which the train was run by defendant as a conductor was not a street railroad. If such was the character, it is clear to them that the statute under which the indictment was preferred has no application. Indeed, the testimony established that the railroad was being operated by a street railway company, and there is nothing shown, in their judgment, which sufficiently overcomes this fact. Every other fact proved is entirely compatible with this one. And clearly, in the absence of some affirmative evidence to the contrary, it will not be presumed the road was not a street railroad. I do not think it makes any difference whether the line was a street car line or not, in a technical sense, as the cars upon which the defendant was a conductor were not such a train as is contemplated by the statute.

The judge of the city court erred in finding the defendant guilty, and the judgment is reversed, and the cause is remanded.

Reversed and remanded.

TYSON, C. J., and DOWDELL and MCCLELLAN, JJ., concur.

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### *Petit Larceny.*

(Decided Feb. 14th, 1907. 43 So. Rep. 115.)

1. *Criminal Law; Appeal; Review; Motion to Quash Venire.*—Although the bill of exceptions recites that a motion to quash the venire was overruled by the trial court, it does not present

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that question for review, on appeal, in the absence of an entry in the judgment showing the court's ruling on the motion.

- 2.—*Larceny; Sufficiency of Evidence.*—Evidence in this case examined and held sufficient to warrant the jury in finding that defendant obtained the property with fraudulent intent to convert it to his own use.

APPEAL from Pike County Law Court.

Heard before Hon. A. H. OWENS.

The defendant was indicted for petit larceny, the taking of a ring of the value of \$15. The evidence tended to show that Evelina Bradberry got a ring, which was found by her little grand-daughter, and that she had had the same for two or more years; that she had made no secret about having it; that she and her son often wore the ring. The evidence further tended to show that Pomp Bradberry wore the ring to defendant's place of business one night, and defendant asked him to let him see the ring; that he gave the ring to defendant, and on leaving the house defendant was gone, and he failed to ask him for it; that he went back the next night to see defendant about the ring, but did not ask him about it; that the morning after he went to defendant for the ring, and defendant told him that he had lost it off his finger that morning while washing his face and hands, and must have thrown it out with the water. Witness then went to defendant's home, and looked about the washstand and the place where the water was thrown out, but failed to find the ring, and went back and told defendant he could not find it. Defendant then said he must have lost it in the bed. Witness went to defendant's home again, searched the room and the bed with the aid of defendant's wife, and could not find the ring. Witness went back to defendant's place of business and told him he could not find the ring, and asked him to pay for it. Defendant offered him a small sum in payment for the ring, which he declined to accept; and defendant had never paid him anything. Defendant, testifying for himself, stated that Pomp Bradberry pulled off the ring in his place of business and asked him if he could fix the set in the ring. Defendant said he

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could fix it by striking it in with a paste he used in fixing the tips on the billiard cues, and that defendant requested him to do so; that he fixed it, and placed the ring on a shelf in his place of business to dry, and never thought any more about the ring until the witness called for it; that he looked for it where he had left it, but could not find it; that a number of people had been in and about his place of business during the day the ring was there, and that he did not know what became of it; that he offered to pay \$5 for the loss of the ring, but that the owner of the ring wanted \$18, which was an exorbitant price for it. The defendant requested the general affirmative charge, which was refused.

D. A. BAKER, for appellant.—No. brief came to the reporter.

ALEXANDER M. GARBER, Attorney General, for State.—The motion to quash the venire cannot be considered.—*Spraggins v. The State*, 139 Ala. 93; *Gaston v. Marengo, etc.*, 139 Ala. 465. The court properly refused the general charge to the defendant.—*Bonner v. The State*, 125 Ala. 49 and cases there cited.

DENSON, J.—A motion was made in the court below to quash the venire of jurors summoned for the second week of the term of the court. The bill of exceptions recites that this motion was overruled, but there is no entry in the judgment proper showing that the court made any ruling on the motion. In this state of the record we will not review the ruling of the court on the motion.—*Gaston v. Marengo Improvement Co.*, 139 Ala. 465, 36 South. 738; *Spraggins' Case*, 139 Ala. 93-102, 35 South. 1000.

Under the evidence in the case it was open for the jury to infer that, at the time the defendant obtained the ring from the state's witness, he did so with the fraudulent intent of converting it to his own use.—*Holbrook v. State*, 107 Ala. 154, 18 South. 109, 54 Am. St. Rep. 65; *Talbert's Case*, 121 Ala. 33, 25 South. 690; *Bonner's Case*, 125 Ala. 49, 27 South. 783; *Dickin's Case*, 142 Ala. 52, 39 South. 14, 110 Am. St. Rep. 17; *Pierce's Case*, 124 Ala. 66, 27 South. 269; *Washington's*

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*Case*, 106 Ala. 58, 17 South. 546; *Eggleston's Case*, 129 Ala. 83, 30 South. 582; *Levy's Case*, 79 Ala. 259; *Verberg's Case*, 137 Ala. 73, 34 South. 848, 97 Am. St. Rep. 17. It follows that the affirmative charge, requested by defendant, was properly refused.

No error appears in the record, and the judgment must be affirmed.

Affirmed.

TYSON, C. J., and HARALSON and SIMPSON, JJ., concur.

## Perry, et al. v. State.

### *Maliciously Defacing a Dwelling.*

(Decided Feb. 7th, 1907. 43 So. Rep. 18.)

1. *Criminal Law; Verdict; Sufficiency.*—Where several are jointly indicted and tried and conviction had, a verdict assessing as a fine a single or lump sum, is invalid; the verdict should assess a fine separately against each offender.
2. *Malicious Mischief; Willful Injury to Real Estate.*—The offense denounced by Section 5620, Code 1896, is one against the possession and does not involve ownership; Hence, one charged with that offense is not entitled to inquire into the right of the possession of the person in actual occupancy at the time of the injury.
3. *Same; Indictment; Sufficiency.*—An indictment charging that the defendants willfully injured or defaced the property of a person therein named is not open to the objections that it fails to allege the ownership of the dwelling, and that it charges the defendants with committing the offense jointly.
4. *Criminal Law; Conviction; Judgment.*—Upon the conviction of the defendant and the assessment of a fine against him, unless the fine and costs are paid or judgment confessed, the judgment must show either that he was imprisoned or sentenced to hard labor. (Sections 5423-5425, Code 1896.)

APPEAL from Walker Law and Equity Court.  
Heard before Hon. T. L. SOWELL.

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The indictment alleged that Ab Perry, Simon Garret, and Arresto Weems did willfully injure or deface a dwelling house, the property of J. J. Earnest, against, etc. Demurrers were interposed as follows: "It does not charge any offense known to the laws of the state of Alabama. (2) It does not allege that the house alleged to have been defaced belonged to J. J. Earnest. (3) It does not show to whom the house belonged that is alleged to have been defaced. (4) Because the person who may happen to have a dwelling on the property is not the person injured, as contemplated by the statute under which the indictment was drawn (section 5620 of the Code of Alabama), but the actual owner; hence the indictment is defective in not alleging who is the owner of the property. (5) Because the indictment charges no offense known to the laws of the state of Alabama, in this: that it attempts to charge the defendants with committing an offense jointly which could not be jointly committed. (6) Because the defendants are charged jointly with committing one and the same offense, which offense cannot be jointly committed. (7) Because there is a misjoinder of the defendants." And others raise the same question as presented by the last three demurrers. The evidence tended to show that the party alleged to be the owner of the house defaced had gone upon certain lands belonging to another than him and built a house, and had occupied the same for 14 years; that the land upon which the house was located belonged to the other, and not to Earnest. The defendants proposed to show that the lands belonged to a certain person, but were not permitted to do so by the trial court. The defendants also offered to show that a certain witness for the state was a woman who kept a bad house, and that bad persons were accustomed to go there; that her house was near the house defaced; and thus to account for the presence of other persons near this house, in connection with the fact that these defendants were not there. The court refused to permit this evidence, but said that the defendants might show that the witness was of bad character for truth and veracity.

RAY & LEITH, and ACUFF & McCULLOM, for appellant.  
—Charges 2, 3, 4 and A should have been given as the

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indictment should have alleged the owner of the injured property. Otherwise, a mere trespasser could get the fine.—§ 5620, Code 1896; *Wright v. The State*, 136 Ala. 145; *Mattox v. The State*, 122 Ala. 110; 63 Ala. 108; 43 Ala. 330; 44 Ala. 380; 28 Ala. 71; 26 Ala. 72; 7 Ala. 728. The verdict of the jury in this case is not sufficient to support the judgment.—19 Ency. P. & P. pp. 468-469; 25 Am. & Eng. Enc. L. 298; *Johnson v. State*, 29 N. G. L. 453; *Sturgeon v. Gray*, 96 Ind. 166; *Miller v. People*, 47 Ill. App. 472; *Caldwell v. Com.*, 7 Dana, 229; *State v. Berry*, 21 Mo. 504; *Waltger v. State*, 3 Wis. 785.

MASSEY WILSON, Attorney General, for State.—The offense was against the possession and the allegation was sufficient that it was the property of J. J. Earnest.—*Lawson v. The State*, 100 Ala. 70; *Wallace v. The State*, 124 Ala. 87; *Parham v. The State*, 125 Ala. 57; *Brunson v. The State*, 140 Ala. 201; *Hannon v. The State*, 73 Ala. 47; *Matthews v. The State*, 81 Ala. 66; *Sewell v. The State*, 82 Ala. 57. The appellants were not improperly joined in the indictment.—*McGee v. The State*, 58 Ala. 76; *Townsend v. The State*, 137 Ala. 21; *Elliott v. The State*, 26 Ala. 78. Earnest not being a trespasser his possession was within the protection of the law.—*Reddock v. Long*, 124 Ala. 260; *Anderson v. Mealer*, 56 Ala. 621. Earnest's character was not in issue.—*Linton v. The State*, 88 Ala. 216; *Rhea v. The State*, 100 Ala. 119; *Spicer v. The State*, 105 Ala. 123. The wife was incompetent as a witness.—*Lyde v. The State*, 132 Ala. 42; *Holly v. The State*, 105 Ala. 100.

MCCLELLAN, J.—The appellants were jointly indicted for violation of section 5620, Code 1896. Upon their joint trial the jury returned, and the court received, the following verdict: "We, the jury, find the defendants guilty as charged in the indictment, and assess a fine of one hundred dollars"—the foreman signing it. The judgment followed the verdict. The verdict was invalid since it failed to separately assess a fine against each offender. The reason is apparent, viz., that payment of the whole fine may be recovered from one of the defendants, thus permitting the others to escape punishment, and thereby



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savoring of the punishment of one man for the guilt of another.—*Jones v. Commonwealth*, 1 Call (Va.) 555; 4 Bacon's Abr. p. 234; 2 Hawkins, p. 635; *Bosley's Case*, 7 J. J. Marsh. (Ky.) 599; *Medis & Hill Case*, 27 Tex. App. 194, 11 S. W. 112, 11 Am. St. Rep. 192; *Ceasar's Case*, 30 Tex. App. 274, 17 S. W. 258.

The offense denounced in section 5620 is one against the possession, and does not involve the ownership, of the land. This court in passing upon a not materially (for this purpose) dissimilar statute, affords authority for the view above announced.—*Wallace's Case*, 124 Ala. 87, 26 South. 932; *Hill's Case*, 104 Ala. 64, 16 South. 114. The bill of exceptions shows that Earnest was in actual possession of the injured dwelling, and had been for many years. The defendants were properly not allowed to institute an investigation into the rightfulness of his possession. The special charges stating a contrary conclusion were correctly refused.

The indictment is valid, and not subject to the objections taken to it.

The effort to inquire into the character for chastity alone of one of the witnesses was properly disallowed.—*Rhea's Case*, 100 Ala. 119, 14 South. 853; *Spicer's Case*, 105 Ala. 123, 16 South. 706.

When a fine is assessed against a defendant, the trial court must either imprison him in the county jail or sentence him to hard labor for the county, as directed by sections 5423-5425, unless the fine and costs are paid or judgment is confessed. This does not appear to have been done in the present case.

The judgment is reversed, and the cause remanded.

Reversed and remanded.

TYSON, C. J., and DOWDELL and ANDERSON, JJ., concur.

[Daniel v. The State.]

**Daniel v. The State.***Selling Liquor Without License.*

(Decided Feb. 17th, 1907. 43 So. Rep. 22.)

1. *Criminal Law; Misnomer; Jury Question.*—Where a plea of misnomer is interposed and the evidence on the plea is in conflict, its decision is properly submitted to the jury.
2. *Intoxicating Liquors; Indictment; Requisite.*—An indictment charging that the defendant sold spirituous, vinous or malt liquors without a license and contrary to law, is in code form and unobjectionable.
3. *Same; Sale or Gift.*—An indictment charging that defendant gave away or otherwise disposed of spirituous, vinous or malt liquors without license and contrary to law, charges no offense.
4. *Indictment; Demurrer.*—The proper mode of reaching a defect in an indictment is by demurrer and not by motion to quash.
5. *Same; Discretion of Court.*—Motion to quash an indictment for defects in the charging portion is addressed to the discretion of the court, and is not reviewable unless abused.
6. *Intoxicating Liquors; Sale; Evidence.*—Evidence that the clerk sold the liquor without a showing that defendant authorized a sale, will not support a charge of the sale of the liquor by the defendant.
7. *Criminal Law; Judicial Notice.*—The court does not judicially know that "hop-ale or hop-jack" is a malt liquor.
8. *Intoxicating Liquors; Evidence; Jury Question.*—Whether hop-ale or hop-jack is a malt or intoxicating liquor, is one of fact for the jury to determine.
9. *Same; Evidence; Admissibility.*—Where the defendant is charged with the sale of spirituous, vinous or malt liquors, and it is sought to establish the charge that he sold hop-ale or hop-jack, it is competent for the defendant to show by the manufacturer of such beverage that it was not spirituous, vinous or malt liquor.

APPEAL from Bessemer City Court.

Heard before HON. WILLIAM JACKSON.

The indictment in this case was as follows (after usual caption): "That Will Daniel sold spirituous, vi-

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nous, or malt liquors without a license and contrary to law; (2) that Will Daniel did give away or otherwise dispose of spirituous, vinous, or malt liquors without a license and contrary to law; (3) that Will Daniel did unlawfully sell, give away, or otherwise dispose of spirituous, vinous, or malt liquors, or other intoxicating beverages, within three miles of Belle Sumter, a coaling ground in precinct 3, in Jefferson county, and not in an incorporated town having police jurisdiction both day and night—against,” etc. To this indictment the defendant filed a plea of misnomer, alleging that his name was not “Daniel,” but “McDaniel,” and that he is not known or called by the name of “Daniel.” This plea was submitted to the jury under the evidence, and issue found against defendant. The defendant also moved to quash the indictment, and each count thereof: “(1) Because said indictment does not charge any offense under the laws of Alabama. (2) It does not charge any offense known to the common law. (3) Said indictment charges in the disjunctive two offenses, and the averment of each disjunctive is insufficient to constitute an offense. (4) Neither does any count thereof in said indictment aver that the alleged selling, giving away, or otherwise disposing of spirituous, vinous, or malt liquors, or other intoxicating beverages, was within two miles of any coaling grounds in the county of Jefferson. (5) It is not alleged in said indictment that the alleged selling, giving away, or otherwise disposing of vinous, spirituous, or malt liquors, or other intoxicating beverages, was done without a license or contrary to law. (6) It is not alleged in said indictment, or any of the counts thereof, that said acts were not done in an incorporated town having police regulation both by day and night. (7) For that the act upon which this prosecution is based has been repealed by an act to provide for the revenue of the state, approved March 4, 1903.” This motion was granted as to the third count, and overruled as to the other two. The facts in the record are sufficiently set out in the opinion. To raise the questions presented, the defendant requested in writing the following charges, which the court refused: “(1) If the jury believe the evidence in this case, they must find the defend-

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ant not guilty. (2) I charge you, gentlemen of the jury, that 'Hop-Ale,' or 'Hop-Jack,' is not a malt liquor. (3) I charge you that the state must show beyond a reasonable doubt and to a moral certainty that the defendant sold, gave away, or otherwise disposed of spirituous, vinous, or malt liquors without a license and contrary to law, and that the evidence must satisfy you beyond a reasonable doubt that 'Hop-Ale,' or 'Hop-Jack,' is a spirituous, vinous, or malt liquor before you can convict the defendant." In its oral charge the court stated to the jury: "I charge you, gentlemen of the jury, as a matter of law, that 'Hop-Ale,' or 'Hop-Jack,' is a malt liquor." The defendant excepted to this, and also to the following oral charge of the court: "If you believe the evidence in this case, that the defendant did, within twelve months before the finding of this indictment in this county, sell 'Hop-Jack,' or 'Hop-Ale,' you should find him guilty."

FRANK S. WHITE & SONS, for appellant.—The act upon which this prosecution is based was repealed by General Acts 1903, page 209. The names are not idem sonans and the affirmative charge should have been given for the defendant.—*Humphreys v. Whiten*, 17 Ala. 30; *Jacobs v. The State*, 61 Ala. 448; *Underwood v. The State*, 72 Ala. 220; *Merlett v. The State*, 100 Ala. 42. The state failed to make out the offense charged. Whether the liquor was a malt liquor or not must be proven.—62 Me. 242; 52 Kan. 53. It must be decided by the evidence in each particular case.—*Wadsworth v. Duncan*, 98 Ala. 610. It is a question of fact for the jury.—*Hinton v. The State*, 132 Ala. 30; *Allred v. The State*, 89 Ala. 112; *Wall v. The State*, 78 Ala. 418. The court erred in reference to the evidence of Witherspoon.—40 Ala. 60; 21 Ala. 571; 34 Ala. 262. The court erred in excluding the testimony of Dr. Schulhofer.—*Pettaway v. The State*, 36 Texas Criminal, 97; *Commonwealth v. Pease*, 110 Mass. 410; *State v. Piche*, 98 Me. 348; *West v. State*, 39 Ind. App. 161; *Karle v. The State*, 87 Ala. 17; 69 Ala. 235; *Knowles v. The State*, 80 Ala. 9; 91 Ala. 47; 98 Ala. 610; 40 Kan. 87; 38 Am. Rep. 344. The

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court's oral charge was erroneous.—44 S. W. 491; 52 Kan. 53; 67 Me. 242, and authorities supra.

MASSEY WILSON, Attorney General, for State.—No brief came to the reporter.

DOWDELL, J.—The defendant filed a plea of misnomer to the indictment. Issue was joined on this plea. The evidence was in conflict. The court properly submitted the question to the jury.

The indictment contained three counts. The defendant moved to quash the indictment, and each and every count thereof. The court sustained the motion to quash as to the third count, but overruled it as to the first and second counts. The first count is in Code form and unobjectionable. The second count is defective, but the proper mode of reaching the defect was by demurrer, and not by motion to quash.—*Boulo v. State*, 49 Ala. 22. Moreover, the motion to quash an indictment is, as a general rule, addressed to the discretion of the court, and in the present case, on the grounds predicated in the motion, the rule applies.—*White v. State*, 74 Ala. 31.

The evidence shows that the defendant was a merchant at Belle Sumter, Ala., in precinct 3, Jefferson county, and that he dealt in groceries and soft drinks; that one Jim Clark was a clerk in defendant's store at said place; and that said clerk sold to the witness a liquor called "Hop-Ale," or "Hop-Jack." The two important questions presented by the record are: First, can the defendant be convicted on proof of sale made by his clerk, without proof that the defendant participated in the act or authorized the doing of it? Second, can the court say, as matter of law, that the liquor called "Hop-Ale," or "Hop-Jack," is a malt liquor, or that it is intoxicating?

As to the first question, in the absence of any evidence tending to show that the defendant participated in the act of selling by said Clark, or that he authorized Clark to make the sale, and the mere fact that Clark was the defendant's clerk, without more, is insufficient to show this. The defendant could not be held criminally responsible for Clark's act.—*Seibert v. State*, 40 Ala. 60;

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*Nall v. State*, 34 Ala. 262; *Patterson v. State*, 21 Ala. 571.

As to the second question: In *Allred v. State*, 89 Ala. 112, 8 South. 56, it was held that "malt liquors" included "ale," and hence the courts judicially know ale to be a malt liquor. The courts, however, cannot judicially know that the liquor called "Hop-Ale," or "Hop-Jack," is the same as ale. The name would naturally indicate a difference. It was also said in *Allred's Case*, *supra*, that "malt liquors" included "beer." In the cases of *State v. Starr*, 67 Me. 242, and *State v. McCafferty*, 63 Me. 223, it was held that it was a question for the jury to determine whether a liquor called "Hop-Ale" was a malt liquor or intoxicating. In the case of *State v. May*, 52 Kan. 53, 34 Pac. 407, it was held that it was a question for the jury whether a liquor called "Hop-Tea" is intoxicating. In *Barnes v. State*, (Tex. Cr. App. 1898) 44 S. W. 491, it was said a court does not judicially know that "Hop-Ale" is intoxicating. There must be affirmative proof to establish this fact, and, where the prosecuting witness testifies that he does not know whether this substance is intoxicating or not, a conviction cannot be sustained. In the case before us the liquor for the sale of which the defendant is prosecuted is called "Hop-Ale," or "Hop-Jack." We are quite certain that the court cannot judicially know that "Hop-Jack" is a malt liquor, or that it is intoxicating, and, under the above authorities, we are of the opinion that the court cannot say as matter of law that "Hop-Ale" is a "malt liquor," or intoxicating, and that the question is one of fact, which should be left to the jury. The evidence in the case before us, without conflict or dispute, showed that the liquor called "Hop-Ale," or "Hop-Jack," was not intoxicating. The defendant proposed to show by the manufacturer of "Hop-Ale," or "Hop-Jack," that it was not a "malt liquor"; but this the trial court would not permit. The court should have allowed this proof to be made.

The questions above discussed were raised both on the introduction of evidence and requested instructions to

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the jury. What we have said will sufficiently point out the errors committed by the trial court.

Reversed and remanded.

TYSON, C. J. and HARALSON and SIMPSON, JJ., concur.

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*Selling Liquor Without a License.*

(Decided Feb. 14th, 1907. 43 So. Rep. 114.)

*Intoxicating Liquors; Offense; Liquor's Prohibited; Malt Liquor.*—

Under Acts 1886-87, p. 665, it is an offense to sell a fluid containing malt, or a weak solution of malt liquor, although such liquid is without intoxicating effect.

APPEAL from Montgomery City Court.

Heard before Hon. W. H. THOMAS.

Oliver Dinkins was convicted of selling liquor without a license, and appeals. Reversed and remanded.

HILL, HILL & WHITING, for appellant.—The court erred in giving the affirmative charge for the state. At most it was a question to be submitted to the jury as to whether the defendant was guilty.—*Tinker v. The State*, 90 Ala. 647; *Alred v. The State*, 89 Ala. 112; *Brantley v. The State*, 91 Ala. 47; *Hinton v. The State*, 132 Ala. 29.

MASSEY WILSON, Attorney General, for State.—It was wholly immaterial whether the liquor was intoxicating or not.—*Feibelman v. The State*, 130 Ala. 122. The burden was on the defendant to show that he has a license.—*Heath v. The State*, 99 Ala. 179; *Freiberg v. The State*, 94 Ala. 91.

DENSON, J.—The indictment is in Code form, as provided by section 5077 of the Code of 1896, and under

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it "any act of retailing in violation of the law may be proved and for any violation of any special and local laws regulating or prohibiting the sale of vinous, spirituous or malt liquors within the place specified, such form shall be good and sufficient." By an act of the General Assembly approved February 28, 1887 (Acts 1886-87, p. 665), the sale, giving away, or otherwise disposing of vinous, spirituous, or malt liquors in the county of Montgomery, outside of the corporate limits and police jurisdiction of the city of Montgomery, is prohibited and penalized. The proof in the instant case tends to show the sale of a tonic in bottles labeled "Cook's Malt Tonic," and also tends to show that the tonic was a fluid, that it contained some malt and was a "weak solution of some malt liquor," but that it had no intoxicating effects.

It is insisted by the defendant (appellant) that, to authorize a conviction, it was incumbent on the state to show that the fluid sold contained an appreciable quantity of malt liquor, or that the malt was the predominant element; and *Brantley's Case*, 91 Ala. 47, 8 South. 816, is cited and relied on in support of the contention. In that case the indictment was in the same form as the one here, and it was sought to secure a conviction under a local statute which prohibited the sale, giving away, or otherwise disposing of vinous, spirituous, or malt liquors, intoxicating bitters, or any other intoxicating drink, by proof of a sale of intoxicating bitters known as "Harter's Wild Cherry Tonic," or "Cherry Bitters"; and the court did hold that, in order to secure a conviction under the indictment, it was indispensable to show that the bitters sold contained an appreciable quantity of one of the classes of liquors specified in the indictment. This ruling is based upon the satisfactory reasoning that, as the form of the indictment is exclusive in respect to all liquors not mentioned therein, a conviction could not be sustained under it on proof of a sale of intoxicating bitters, unless such bitters contained an appreciable quantity of one of the classes of liquors specified in the indictment.—*Allred's Case*, 89 Ala. 112, 8 South. 56. In *Feibelman's Case*, 130 Ala. 122, 30 South. 384, the defendant was "indicted, tried, and con-



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victed for selling vinous, spirituous, or malt liquors without a license and contrary to law." The statute under which the conviction was had prohibited the selling of spirituous, vinous, or malt liquors, or intoxicating bitters or beverages, within three miles of Ruhama Baptist Church, Jefferson county (Acts 1880-81, p. 156). It was shown on the trial of the case that the defendant, at East Lake, within three miles of said church, sold a liquor known as "Hop Jack," which contained from 1 3-4 to 2 per cent. alcohol, and that it was produced by fermentation of malted barley, diluted with water, and was, therefore, a malt liquor; but it was not capable of producing intoxication. The defendant moved to exclude all the testimony upon the ground that "the beverage shown to have been sold by the defendant was not within the statute, and that 'Hop Jack' was not intoxicating." The court, through McCellan, C. J., reviewing the ruling of the court overruling the motion to exclude the evidence, said: "We may, for all the purposes of this case, concede, without indicating any opinion upon the question, that the Legislature may not, in the exercise of police power, prohibit the sale of malt liquor which is not intoxicating nor otherwise deleterious in any way, where the sole purpose and object is the prevention of the sale of that particular character or quality of malt liquor. But it is common knowledge that most malt liquors are intoxicating and harmful when used excessively, and are capable of excessive use as a beverage. The sale of all such, of course, the Legislature has the power to prohibit. But, if the prohibition should go only to the sale of intoxicating malt liquors, there would be left open such opportunities for evasions and there would arise such difficulties of proof as the law could not be effectively executed; and the law makers having the undoubted power to prohibit and to prevent the sale of intoxicating malt liquors, and to enact to that end a law which can be executed so as to secure it, and finding that this cannot be accomplished without extending the prohibition to all malt liquors, whether intoxicating or not, such extension, necessary to prevent the sale of intoxicants, is as essentially the proper exer-

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cise of the police power as the inhibition with reference to intoxicants."

The effect of the ruling in that case is that the sale of all malt liquor, whether containing sufficient quantity of malt to produce intoxication or not, or whether malt is the "predominant element" or not, may be prohibited by the Legislature.—*Evan's Case*, 113 Ga. 749, 39 S. E. 318; *State v. O'Connell*, 99 Me. 61, 58 Atl. 59. There can be no doubt in the instant case that the evidence tended to show the fluid sold by the defendant was composed partly of malt, and herein the case differentiates from the *Brantley Case*, *supra*, and falls within the influence of the *Feibelman Case*, *supra*; and under the rule as declared in *Feibelman Case* it is of no consequence that the fluid contained in the bottles sold to the state's witness and labeled "Cook's Malt Tonic" did not contain malt in sufficient quantity to produce intoxication, or that malt was not the predominant element in the fluid. If it was composed in part of malt liquor, the sale of it is inhibited by the act of the General Assembly of February, 1887, and the defendant might be convicted under the present indictment for selling it. We think, however, that the evidence as shown by the record, in respect to the fluid containing malt, is not so free from adverse inferences as authorized the court to give the affirmative charge in favor of the state or the defendant. The question should have been submitted to the jury under appropriate instructions by the court. In giving the charge for the state, the court committed reversible error. There is no error in the refusal of the charge asked by defendant.

The judgment is reversed, and the cause remanded.

TYSON, C. J., and HARALSON and SIMPSON, JJ., concur.

[Smith v. The State.]

**Smith v. The State.***Habeas Corpus.*

(Decided Feb. 14th, 1907. 43 So. Rep. 129.)

1. *Criminal Law; Time of Trial; Discharge for Delay; Discontinuances.*—Petitioner was convicted and sentenced to the penitentiary on January 9th, 1905, the judgment was affirmed, but on application for rehearing, on Feb. 4th, 1905, the judgment was annulled and the cause reversed, and defendant remained in the custody of the convict department until the filing of this petition for habeas corpus on Dec. 23rd, 1905. Held, this did not entitle him to a discharge for delay in trial, nor did the fact that one entire term of the criminal court of Jefferson county passed without an order having been made in the case, entitle him to a discharge because of a discontinuance, as it appeared that at the next term a forfeiture was taken against defendant and bail and an alias capias issued for his arrest.
2. *Criminal Law; Discontinuance.*—The omission by a ministerial officer to do something it was his duty to do, or the passing of a term of court without entering an order continuing a case on the docket will not constitute such a chasm in a criminal prosecution as will work a discontinuance. A discontinuance must come from some act of the court or prosecuting officer evidencing an intention to abandon the prosecution.

APPEAL from Montgomery City Court.

Heard before Hon. A. D. SAYRE.

Appeal from a judgment and order of the city court of Montgomery on habeas corpus, denying the writ. The facts on which the opinion is rested sufficiently appear therein.

B. M. ALLEN, and RUSHTON & COLEMAN, for appellant. Upon a reversal of the judgment of conviction the defendant should have been returned to the custody of the sheriff of Jefferson county and his confinement in the penitentiary afterwards was illegal.—Sec. 4468, Code 1896; *White v. The State*, 134 Ala. 197.

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Where a prisoner is unlawfully detained in custody contrary to a legal judgment and sentence, he should be discharged on a habeas corpus.—*Kirby v. State*, 62 Ala. 51; *Ex Parte Pearson*, 59 Ala. 654; *Ex Parte Rand*, 99 Ala. 302, (14 So. 540); *Ex Parte Goucher*, 103 Ala. 305, (15 So. 601); *Ex Parte King*, 82 Ala. 59, (2 So. 763); *Ex Parte Crews*, 78 Ala. 457; *Ex Parte Espalla*, 109 Ala. 92, (19 So. 984); *Ex Parte Stewart*, 98 Ala. 68, (3 So. 660); *King v. State*, 62 Ala. 57; *Ex Parte White*, 134 Ala. 197; *Ex Parte O'Neil*, 134 Ala. 189; *Ex Parte O'Neil*, 134 Ala. 664. Any unreasonable detention of a prisoner entitles him to be discharged by reason of a "subsequent act, omission or event."—*Ex Parte King*, *supra*; *Ex Parte Goucher*, *supra*. What is a reasonable length of time, depends upon the circumstances of the particular case.—*Kirby v. State*, 62 Ala. 51.

A discontinuance is defined to be a gap or chasm in the proceedings, occurring while the suit is pending, and the law, applicable thereto, effects both civil and criminal cases.—*Drinkard's Case*, 20 Ala. 9; *Ex Parte Hall*, 47 Ala. 675; 2 Brick. Dig. p. 367, Sec. 92, et seq.; *Ex Parte State of Alabama*, 115 Ala. 123; *Ex Parte Sterns*, 104 Ala. 93; Clark's Manual of Crime Law, p. 434. When a cause is discontinued in a criminal case, there is no longer a pending prosecution upon which the defendant may be held, and he must be discharged.—*Ex Parte Sterns*, 104 Ala. 97. Where the plaintiff leaves a chasm in the proceeding of his cause, as by not continuing the process regularly from day to day and from time to time, as he ought to do, the suit is discontinued, and the defendant is no longer bound to attend, but the plaintiff must begin again.—*Ex Parte Hall*, 47 Ala. \*83; Blackstone's Commentaries, Vol. 3, p. 296.

Criminal cases can be discontinued by failing to prosecute it regularly.—*Drinkard v. State*, 20 Ala. 13.

MASSEY WILSON, Attorney General, for State.—The facts of the petition are fully set out in the transcript. The following cases clearly show that the order of the trial judge was proper, and that the appellant was not entitled to his discharge absolutely.—*White v. The State*, 134 Ala. 197; *Roberts v. The State*, 126 Ala. 87; Code, § 4468.

[Smith v. The State.]

SIMPSON, J.—This is an appeal from the judgment of the city court of Montgomery in a habeas corpus proceeding. The record shows that the appellant (petitioner) was convicted in the criminal court of Jefferson county, May 7, 1904, of the offense of murder in the second degree, and sentenced to be imprisoned in the penitentiary for 30 years. Said judgment was affirmed by this court on January 9, 1905; but on February 14, 1905, on a rehearing, the judgment of conviction was reversed and the cause remanded. However, when the judgment of conviction was affirmed, the appellant was sent to the penitentiary, and was still in the charge of the convict department, when the writ of habeas corpus was sued out on December 23, 1905. In the meantime one entire term of the criminal court of Jefferson county had passed; the cause being on the docket, but the record showing no continuance, or other order in relation to the case. On the second term of said court, to-wit, the September term, 1905, an order was made in said case, in said court, adjudging a forfeiture against said petitioner, and an alias capias ordered to be issued against him. Petitioner claims that he is entitled to be released from confinement, and invokes, first, the principles announced in cases where prisoners have been discharged on account of unreasonable delay in carrying out the sentence of the law; and, second, the principles on the subject of discontinuances, by which it is claimed that the facts recited show a discontinuance of the case in the criminal court of Jefferson county.

Upon the first proposition this court has gone over all of the cases upon the subject, and has held that the reason why discharges were granted in previous cases was that, not only there had been unreasonable delay in carrying out the sentence of the law, but also no suitable provision had been made for carrying out the sentence at all. The court accordingly held that, although the prisoner be in the custody of some officer who is not entitled to hold him, yet, where there is a person or officer who is entitled to the custody of the prisoner under the sentence, "he will not be discharged absolutely, but will be discharged from the custody of the person holding him, and committed to the lawful custody" of the

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officer or party who is entitled to hold him.—*White v. States*, 134 Ala. 197, 207, 209, 32 South. 320. From the principles decided in this case, and the cases cited, the order of the judge of the city court of Montgomery was correct, unless the failure to continue the case and the subsequent order in the criminal court of Jefferson county by which a forfeiture was taken worked a discontinuance of the case.

It is true that a criminal case, as well as a civil suit, may be discontinued by the act of the prosecuting officer for the state, and a discontinuance is defined as “a gap or chasm in the proceeding, after the suit is pending.” But, in order to constitute such chasm, it is not sufficient that some ministerial officer has omitted to do something which it was his duty to perform, but it must be the act of the prosecuting officer, indicating his intention to abandon the prosecution of the case.—12 Cyc. 378; *Drinkard v. State*, 20 Ala. 9, 12; *Harrall v. State*, 26 Ala. 52, 57; *Ex parte Hall*, 47 Ala. 675, 680; *Ex parte Driver*, 51 Ala. 41; *Scott v. State*, 94 Ala. 80, 10 South. 505; *Ex parte Humes*, 130 Ala. 201, 203; *Miller v. State*, 110 Ala. 69, 85, 20 South. 392; *Farr v. State*, 135 Ala. 71, 33 South. 660. The case of *Ex parte Stearnes*, 104 Ala. 93, 97, 16 South. 122, is not in conflict with what has been said. That, and the cases therein cited, are based upon the principle that, when a party is committed on preliminary examination, or bound over to answer an indictment to be found at the term of court, and said court has met and adjourned without action, the mittimus or the bond has become functus officio, and there is no proceeding in court to hold him; consequently, the party is entitled to be discharged from custody.

On the other hand, when a cause is regularly on the docket, the passing of a term without the entering of an order continuing the same does not make such a chasm as to work a discontinuance, unless the record discloses some act of the plaintiff or prosecuting officer by which the chasm is produced.—*Ex parte Owens*, 52 Ala. 473; *Ex parte Holton*, 69 Ala. 164, 168; *Benson v. State*, 91 Ala. 86, 8 South. 873. The action of the court at the second term in entering the forfeiture, while erroneous,

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was not such as to create a chasm, but, on the contrary, showed a continuing prosecution of the case.

The judgment of the court is affirmed.

TYSON, C. J., and HARALSON and DENSON, JJ., concur.

## Weinard v. The State.

### *Habeas Corpus.*

(Decided Dec. 20th, 1906. 42 So. Rep. 991.)

1. *Criminal Law; Appeal; Disposition of Cause; Affirmance.*—Section 4334, Code 1896, applies only to cases in which capital punishment is imposed, and the date fixed expires before the determination of the appeal; and where the defendant is convicted of a misdemeanor and appeals, giving bail, as provided by section 4321 of the Code, the supreme court, on affirmance of the appeal, need not resentence, nor fix the date for the beginning of the sentence, the undertaking by the defendant being to surrender herself to begin the sentence upon such an affirmance.
2. *Same; Sentence; Sufficiency.*—The sentence in this case was that defendant perform hard labor for a period of thirty days to pay the fine, and hard labor for 352 days to pay the costs, amounting to \$105.65, and that the sentence should begin on April 11th and expire on Feb. 11th following, and not to exceed ten months. Held, such sentence was not void, although it should have been for thirty days to pay the fine, and ten months additional to pay costs. such sentence is sufficient to prevent a discharge of the defendant from a compliance therewith, and to prevent a discharge of the sureties on her bond in the event she does not surrender herself after affirmance on appeal.

APPEAL from Monroe Probate Court.

Heard before Hon. I. B. SLAUGHTER.

Habeas corpus by Lou Weinard to obtain her release from custody under a sentence ordered on a conviction of selling liquor without a license. From a judgment denying the writ, she appeals. Affirmed.

[Weinard v. The State.]

The petitioner was indicted in the circuit court of Monroe county for selling liquors without license, convicted, and the following judgment entered (after setting out the day of trial, the arraignment, and plea of defendant): "Thereupon came a jury of twelve good and lawful men, to-wit, W. L. Simmons and eleven others, who, being impaneled and sworn and charged according to law, upon their oaths do say: 'We the jury, find the defendant guilty as charged in the indictment and assess a fine of one hundred dollars.' It is therefore considered and adjudged by the court that the defendant is guilty, and that the state of Alabama, for the use of Monroe county, have and recover of the defendant the sum of one hundred dollars fine, together with the costs in this behalf expended. The defendant, not having paid or secured the said fine and costs, is sentenced to hard labor for Monroe county for a period of thirty days to pay the fine, and to hard labor for the county for an additional time of three hundred and fifty-two days to pay the costs, amounting to one hundred and five dollars and sixty-five cents, at thirty cents per day. Time to begin on the 11th day of April and not to exceed ten months, and not to expire until the 11th day of February, 1906." The defendant appealed from this judgment, and pending said appeal sentence was suspended upon the defendant entering into a bond for her appearance at the trial court to abide the action of the supreme court. The judgment was affirmed on appeal, and the petitioner filed a writ of habeas corpus, alleging that she is being restrained of her liberty, in that she was being held by one Fountain, sheriff of Monroe county, under a void judgment of sentence, as shown by the judgment above set out. Upon the hearing the court denied the writ, and remanded her to the custody of the sheriff. The contention seems to be that, the supreme court failing to pronounce judgment and sentence in the opinion on the appeal and the lower court not having resented her under the former judgment, the sheriff had no right to hold her.

No counsel marked for appellant.



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MASSEY WILSON, Attorney General, for State.—Counsel discusses the questions presented by the record but cite no authority.

ANDERSON, J.—The affirmance of an appeal in a criminal case does not require a resentencing by this court in order to put into operation the judgment and sentence from which the appeal was had. The sentence is merely suspended during the pendency of the appeal, and an affirmance or dismissal of the appeal does not change the judgment of the lower court, but leaves it in full force and effect, except, of course, the delay incident to the appeal may postpone the commencement and expiration of the sentence, when it is for a given time. The petitioner gave a bond as provided by section 4321 of the Code of 1896, and said section provides for the enforcement of the judgment and sentence, when the judgment of conviction is affirmed, or the appeal is dismissed by the court. Section 4334 of the Code of 1896 is intended only for cases in which capital punishment has been fixed, and the date fixed for same has expired before a final determination of the appeal by this court. In all other cases there need be no resentencing by this court, upon an affirmance of the judgment or a dismissal of the appeal, in order to put into operation the judgment and sentence of the trial court. It stands just as if no appeal was had, except when, for a given time, the date for the commencement and expiration is necessarily changed.

The sentence in the case at bar is not void, but is not strictly in compliance with the law. The sentence provides that, in default of the payment of the fine, defendant is sentenced to hard labor for the county “for thirty days to pay the fine and to hard labor for the additional time of three hundred and fifty-two days to pay the cost.” The judgment entry, after reciting the amount of cost due to be \$105.65, and that at 30 cents per day it requires 352 days, further provides that the sentence begins “on April 11, 1905, and expires February 11, 1906, and not to exceed ten months.” Under the law the sentence to hard labor for the cost could not exceed 10 months, or 300 days; but, while the defendant was given

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352 days to pay the cost, the judgment fixes the whole punishment at 10 months, and expressly provides that it shall not exceed that period. The 30 days to pay the fine should not have been included in the 10 months, if the cost was enough to require 10 months' labor to discharge the same. The sentence to pay the cost should be in addition to the the time to pay the fine, or the time fixed as punishment, and the time to pay the cost alone cannot exceed 10 months. The law does not require that the total sentence shall not exceed 10 months. The sentence, therefore, in the case at bar, should have been 30 days to pay the fine and 10 months additional to pay the cost, a total of 11 months, instead of 10, as fixed by the judge of the circuit court.—Code 1896, § 4532.

The judgment in the case at bar is unlike the one in *Linnehan's Case*, 120 Ala. 293, 25 South. 6, as the court determined the time required to work out the sentence by ascertaining the amount of cost, and the record clearly shows that the error committed was in favor of the defendant. In *Linnehan's Case*, *supra*, while the sentence was only for 8 months, yet the amount of cost was not disclosed, and may have been a sum insufficient to require 8 months at 30 cents per day, and there was no ascertainment of this fact by the court. For that reason, the judgment as to the sentence was reversed. In the case at bar the sentence is not void, and, while less than the judgment would warrant, it is sufficient to prevent a discharge of the defendant from a compliance therewith, or the sureties on her bond in the event of a noncompliance with section 4321 as to surrendering herself.

The judge of probate properly denied the petitioner's discharge, and the judgment is affirmed.

TYSON, C. J., and DOWDELL and SIMPSON, JJ., concur.

[Nicholson v. The State.]

**Nicholson v. The State.***Abusive, Insulting of Obscene Language.*

(Decided Feb. 7th, 1907. 42 So. Rep. 1015.)

1. *Criminal Law; Trial; Order of Proof.*—It is within the discretion of the trial court to permit the state to examine a witness on the main case after the defense had closed its case, and not reviewable.
2. *Same; Misconduct of Counsel; Argument to Jury.*—Where the defendant's counsel in argument to the jury said to them that they might consider the fact that the woman was accustomed to use such language, herself and that she boarded women of notoriously bad character for two or three weeks, it was not error to permit the solicitor to argue and state to the jury, "that if the woman was the vile bad woman, which the defendant says she is, why then did they not bring witnesses here to prove it. If she was a bad character don't you know that they would have brought witnesses here to prove it."

APPEAL from Gadsden City Court.

Heard before Hon. J. H. DISQUE.

The defendant was indicted, tried, and convicted of using abusive, insulting, or obscene language in the presence of a woman. After the state had made out its main case, and had rested, and after the defendant had introduced its case, the state called one John Smallwood, as a witness, and he was permitted, over the objection of the defendant, to testify to facts cumulative of the main case, and not in rebuttal to evidence introduced by the defendant. In making his argument to the jury, counsel for defendant argued that the jury might look to the fact, if it be a fact, that Mrs. Busbee was accustomed to using offensive language such as is complained of in this case to the defendant, in determining what the punishment of the defendant should be in the event they should find him guilty; that the law said the fact that a woman used profane language, and was accustomed to use such language, to the defendant, was a circumstance

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the jury might look to in mitigation of the offense, and also that the fact that Mrs. Busbee boarded, for two or three weeks, women of notoriously bad character, was a fact that the jury might look to in weighing her evidence and in determining the character of Mrs. Busbee. In his closing argument, the solicitor said to the jury: "If Mrs. Busbee is a vile, bad woman, which the defendant says she is, why, then, did not the defendant bring witnesses here from Alabama City to prove her bad character? She has been living out there for several years, and is well known by the people of Alabama City. Ah, gentlemen, if she was the bad character, don't you know they would have brought witnesses here to prove it?" The defendant objected to these statements of the solicitor, whereupon the court asked defendant's attorney to point out the remark of the solicitor to which he objected, and he pointed out the above. The court replied, in the hearing of the jury: "I think the argument legitimate. Go on."

BOYKIN & BRINDLEY, for appellant.—The court erred in permitting the solicitor to make use of the argument indulged in in his closing remarks.—*Dunmore v. The State*, 115 Ala. 69; *Griffin v. The State*, 90 Ala. 596; *McAdory v. The State*, 62 Ala. 154; *Coppin v. The State*, 123 Ala. 58; *Brock v. The State*, 123 Ala. 24. On the same authority the remarks of the court in overruling defendant's objection to this argument was error. The court erred in permitting the state to introduce Smallwood.

ALEXANDER M. GARBER, Attorney General, for State.—It was discretionary with the court to permit the witness Smallwood to testify and not reviewable.—*Braham v. The State*, 143 Ala. 38; *Riley v. The State*, 88 Ala. 193; 8 Ency. of P. & P. 132. The remarks of the solicitor and the court's reply to the objection were not improper.—*Golson v. The State*, 86 Ala. 601; *Byers v. The State*, 105 Ala. 31.

ANDERSON, J.—The action of the trial court in permitting the state to examine the witness Smallwood, af-

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ter the defendant had closed his evidence, was discretionary, notwithstanding the evidence was not in rebuttal, and should more properly have been brought out before the state rested.—*Braham v. State*, 143 Ala. 28, 38 South. 919; *Riley v. State*, 88 Ala. 193, 7 South. 149; 8 Ency. Pl. & Pr. 132.

So much of the argument of the solicitor as was objected to was legitimate as a reply to the argument of counsel for the defendant, and the trial court committed no error in refusing to exclude the same.—*Bardin v. State*, 143 Ala. 74, 38 South. 833.

The judgment of the city court is affirmed.

[REDACTED]

TYSON, C. J., and DOWDELL and McCLELLAN, JJ., concur.

## Jones v. The State.

### *False Pretenses.*

(Decided Feb. 5th, 1907. 43 So. Rep. 28.)

*Criminal Law; Misdemeanor; Jury Trial Demanded; Necessity for Indictment.*—Where the prosecution is begun upon affidavit and warrant before a justice of the peace, and the defendant demands a trial by jury, the defendant cannot be tried except upon indictment returned by the grand jury.

APPEAL from Walker Law and Equity Court.

Heard before Hon. T. L. SOWELL.

The prosecution in this case was commenced by affidavit before one L. C. Kelly, a justice of the peace in Walker county. Upon the making of the affidavit, the justice of the peace issued the following command to any lawful officer of the state of Alabama: "You are hereby commanded to arrest Charlie Jones (colored), and bring him before me at my office at Carbon Hill, Ala., instant-er, to answer the state of Alabama of an attempt to obtain money by false token or pretense." On the trial be-

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fore the justice of the peace the defendant demanded trial by jury, whereupon the justice fixed his bond, and in default of bond committed him to jail until he was legally discharged. The case was put upon the docket of the Walker law and equity court to be tried upon the affidavit and warrant originally obtained from the justice court and before an indictment has been returned by the grand jury of said court. The defendant objected by way of demurrer and motion to being tried until an indictment had been preferred in the cause. The court overruled the demurrers and denied the motion, and put the defendant upon his trial upon the affidavit and warrant, after allowing the same to be amended. The defendant was convicted and appealed.

RAY & LEITH, for appellant.—The original affidavit in the case was void and could not be amended.—*Miles v. The State*, 94 Ala. 106. The objections to the evidence should have been sustained.—*Rogers v. The State*, 62 Ala. 170. ) Counsel discuss the other matters referred to in the opinion but cite no authority.)

MASSEY WILSON, Attorney General, for State.—No brief came to the reporter.

ANDERSON, J.—The prosecution was commenced before a justice of the peace upon affidavit and warrant returnable before him, and was for an offense of which he had final jurisdiction. The defendant demanded a jury trial, as is provided by section 4636 of the Code of 1896. This precluded the justice of the peace from taking any steps in the matter, other than to bind the defendant over to the circuit or city court (the Walker law and equity court in this instance), or to order the defendant committed to jail in default of a bond. The Walker county law and equity court has jurisdiction to try all misdemeanors upon affidavit made before the judge of said court, upon appeals to said court, upon affidavits made before magistrates where the process is returnable to said court, and upon indictments returnable to said court or transferred to same.—Acts 1900, p. 112, and as amended on page 1112 of said Acts. The affida-

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vit in the case at bar having been made before a justice of the peace, and the process being returnable to him, the Walker law and equity court had no jurisdiction to try the case until an indictment was found by the grand jury, as the demand for a jury trial under the Code did not give the Walker court jurisdiction to try the case upon affidavit, as in cases of appeal upon affidavits made before justices and returnable to said court. The case did not get before said court under either of said methods, and it had to rely upon an indictment to acquire jurisdiction to try the same.—*Clark v. State*, 46 Ala. 307; *Ware v. State*, 145 Ala. 93, 41 So. 181.

It is true the justice did not have final jurisdiction in the *Ware Case*, *supra*; but the principle of acquiring jurisdiction by the court to which the defendant is bound over upon his demand under the statute is the same. This point does not seem to have been fully considered or discussed when this case was here before, which is reported in 41 South. 299. Nor is the case of *Frost v. State*, 124 Ala. 71, 27 South. 550, in conflict with what we hold in the case at bar. The city court had jurisdiction in said case, as the prosecution was instituted in said court, which gave it jurisdiction to try the defendant, either with or without a jury, dependent upon his demand. The judge of the Walker law and equity court erred in not granting defendant's motion to dismiss the prosecution, and the judgment is therefore reversed, and one is here rendered discharging the defendant.

Reversed and rendered.

TYSON, C. J., and DOWDELL and McCLELLAN, JJ., concur.

[Moore v. The State.]

**Moore v. The State.***Misdemeanor.*

(Decided Jan. 17th, 1907. 42 So. Rep. 996.)

*Criminal Law; Judgment.*—In a misdemeanor case the sentence should show an ascertainment of the costs and the determination by the court of the number of days required to work it out, at thirty cents per day, not to exceed ten months; and a sentence ordering accused to perform additional labor, not to exceed ten months, at eighty-three cents per day, until the costs are satisfied, is improper, but the court will do no more than to reverse for a resentence according to law.

APPEAL from Jefferson Criminal Court.

Heard before Hon. S. L. WEAVER.

Emmett Moore was indicted, tried and convicted of grand larceny. He was sentenced to two years hard labor for the county, and an additional term to pay costs, the judgment entry thereon sufficiently appearing in the opinion of the court.

No counsel marked for appellant.

MASSEY WILSON, Attorney General, for State.—No brief came to the reporter.

ANDERSON, J.—There is no bill of exceptions in this case, and the record discloses no error of the trial judge except as to the sentence for cost. The judgment recites: "And the cost legally taxed against the defendant not being presently paid or secured, it is ordered that the said defendant perform additional hard labor for the county a sufficient number of days at the rate of eighty-three cents per day to pay said costs, said number of days not to exceed ten months." Section 4532 of the Code of 1896, providing for sentence for cost, among other things, says: "And the court must determine the



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time required to work out such costs at the rate of thirty cents per day." There is nothing in the present record to indicate the amount of the cost, or the length of time required to work it out at 30 cents per day. True, the sentence provides that the time shall not exceed 10 months; but this is not sufficient. The sentence should show an ascertainment of the cost and the determination by the court of the number of days required to work it out—not to exceed ten months.—§ 4532 of the Code of 1896; *Linnchan v. State*, 120 Ala. 293, 25 South. 6; *Weinard v. The State*, 149 Ala. 57, 42 South. 991. Again, the rate should be 30 cents per day, and not 83 cents, as by the sentence.

The judgment of the criminal court is reversed as to the sentence, and the cause is remanded for further sentence by the criminal court as indicated above.

Reversed as to sentence, and remanded.

DOWDELL, DENSON, and MCCLELLAN, JJ., concur.

## Maxwell v. Herzfeld, et al.

*Bill to Declare a Deed a Mortgage and to Declare the Mortgage Void Because Security for the Husband's Debt.*

( Decided Jan. 24th, 1907. 42 So. Rep. 987.)

*Mortgages; Absolute Deed as Mortgage; Conditional Sale.*—The complainant's husband being indebted to firm of which H. was a member, the complainant conveyed by deed absolute on its face lands belonging to her separate estate to H., who applied the purchase money to the husband's debt to the firm. Complainant averred that at the time of the execution of the deed to H. he agreed to reconvey the land to complainant on payment to him of the consideration therein expressed, with 8 per cent interest. Held, that the conveyance was not a mortgage, and invalid under section 2529 of the code of 1896, but was a conditional sale of the land with a right to repurchase, and not a mere security for the husband's debt.

[Maxwell v. Herzfeld, et al.]

APPEAL from Coosa Chancery Court.

Heard before Hon. W. W. WHITESIDE.

Bill by Susan P. Maxwell against Rosa Herzfeld and others. From a decree in favor of defendants, complainant appeals.

The case made by the bill is that orator was the owner and possessor of certain real estate, which was and is her statutory separate estate, and that her husband owed Herzfeld & Foshin a sum of money, and to pay said sum she sold the real estate to Herzfeld, who applied the purchase money to the payment of the debt due the firm. She alleges that the deed, absolute on its face, was intended as a mortgage to secure Herzfeld for his payment to his firm, and that the land was to remain hers as long as her husband paid the legal interest on his debt. The bill seeks to declare the deed a mortgage, and to declare it void as a mortgage, for that it was an attempt to secure the husband's debt. The respondent denied that the deed was intended to be a mortgage, but alleged a straight purchase of the land without reservation, and without any intention of placing the same as security for the debt of orator's husband. Respondent further alleged that he paid full value for the land and received an absolute conveyance of the same. The tendencies of the evidence are sufficiently set out in the opinion. The chancellor denied the relief prayed for, holding the deed in the case, not a mortgage, but a conditional sale. From this decree this appeal is prosecuted.

FELIX L. SMITH, for appellant.—Bill is filed to have a deed absolute on its face declared a mortgage and the mortgage held void under section 2528, Code 1896. Courts of equity are not favorable to conditional sales and if it be doubtful whether the transaction was a conditional sale or a mortgage the courts are inclined to hold that the agreement was intended to be a mortgage.—*Peagler v. Stabler*, 91 Ala. 309; *Turner v. Wilkerson*, 72 Ala. 366. All the indicia of a mortgage are shown in the present case.—*Henderson, et al. v. Bronson*, 37 So. Rep. 549.

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GEORGE A. SORRELL, for appellee.—The agreement in this case was a conditional sale with a right of repurchase and not a mortgage.—*Parrish v. Gates*, 99 Ala. 254; *Swift v. Swift*, 36 Ala. 147. In any event the deed having been made by a third person to the wife at the request of the husband who paid the purchase money the same is void as to creditors.—*Wimberly v. Montgomery Fertilizer Company*, 132 Ala. 114; *Kelly v. Connell*, 110 Ala. 543; *First National Bank v. Smith*, 93 Ala. 97. That the evidence showed that the transaction was a conditional sale and not a mortgage the court is referred to the case of *Vincent v. Walker*, 86 Ala. 323.

TYSON, C. J.—The bill in this cause seeks to have a certain deed, absolute on its face, executed by complainant to one Herzfeld, declared a mortgage, and then to have the mortgage declared void, because given to secure the debt of her husband, in violation of section 2529 of the Code of 1896, which declares “the wife shall not, directly or indirectly, become the surety of the husband.” From this statement it will be observed that the bill is not one for redemption, recognizing the validity of the mortgage, should the evidence warrant the finding of the fact that it was the intention of the parties that such should be the nature and character of the deed. Does the evidence establish the fact that the deed was intended by both parties to be a mortgage—a mere security for a debt? The burden of proving the affirmative of the proposition by clear and convincing evidence is undoubtedly upon the complainant. Conceding that it is shown the grantee in the deed agreed at the time of its execution that he would reconvey the land to complainant, the grantee, upon the payment to him of the consideration expressed in it, with 8 per cent. interest thereon; this fact will not, in and of itself, in this class of cases, have the effect of making the deed a mortgage, but must be held simply to have the force and effect of stamping the transaction as a conditional sale. This is upon the principle that “where the instrument, if construed to be a mortgage, will become void and operative to promote injustice by losing to the grantee his money paid for the land, and of restoring to the grantor prop-

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erty without an honest return of the money actually received by him, and for the security of which such property was conveyed, the inclination of a court of equity, in a case of doubt, will be to regard the transaction as a conditional sale, and not a mortgage. That construction will rather be adopted, on well-settled principles, which will uphold the instrument, and not destroy it—which will work equity between the parties, and not injustice.”—*Vincent v. Walker*, 86 Ala. 337, 5 South. 465.

This principle in no wise conflicts with the one relied upon by the appellant, so often announced and applied in cases where the bill was to have a deed declared a mortgage and to redeem, that courts of equity are inclined to consider the transaction as a mortgage rather than a conditional sale. In those cases this construction of the transaction is adopted because complete justice can be done to both parties. The mortgagee is secured in the payment of the money he may have loaned or advanced, with interest, and the mortgagor is protected in his equity of redemption.—*Turner v. Wilkinson*, 72 Ala. 365. No such consideration obtains here, and therefore the principles first above announced must govern and control. Here, if the deed be declared a mortgage and then stricken down, as prayed, because void, the grantee in it would have no security for the money he paid on the faith of the transaction to his firm. Upon a consideration of the whole evidence, we feel constrained to hold, upon the reasoning which was allowed to control in *Vincent v. Walker*, *supra*, that the complainant has not proven the allegations of her bill that the deed was understood and intended by Herzfeld to be a mere security for a debt.

Affirmed.

HARALSON, SIMPSON, and DENSON, JJ., concur.

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### *Bill to Abate Nuisance and for Damages.*

(Decided March 2, 1907. 43 So. Rep. 352.)

1. *Water; Surface Water; Obstruction; Nuisance; Injunction.*—The land owner's remedy at law being inadequate equity will grant relief to abate a nuisance consisting of the construction of a railroad embankment which impeded the flow of surface water and constitutes a permanent and continuous obstruction thereof causing such water to overflow the land.
2. *Same.*—A railroad company has no right to obstruct the natural flow of surface water by its embankments to the injury of the higher land-owner.
3. *Equity; Bill; Multifariousness; Demurrer.*—The objection that a bill is multifarious may properly be taken by demurrer.
4. *Same.*—A bill was filed against two railroad companies alleging distinctive grievances; against one company for permitting a certain culvert to be filled up from its own neglect; against the other for digging a ditch along the north side of its embankment; and against the latter company for building a bridge over a certain creek, etc., and thereby obstructing the natural flow. The bill was dismissed as against the first company by complainant and judgment for costs entered against her thereon. Held, as the companies were not joint tort feorsors. the dismissal as to one did not discontinue the cause, but did relieve the bill of multifariousness.
5. *Estoppel; Equitable Estoppel; Grounds.*—The fact that the land owner stated to the company that she wanted something done with the water that was being retained by its embankment and that she wanted the water carried off either by cutting a ditch or by a culvert, did not estop her to abate the nuisance caused thereby or to recover damages from the manner in which the ditch was constructed and efforts made by the railroad company to carry off the water, the land owner having no right to direct the railroad company with respect to the construction of its ditch and the manner in which it should provide for the flow of surface water.

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APPEAL from Etowah Chancery Court.

Heard before Hon. R. B. KELLY.

Bill by Fannie A. Pouty against the Alabama Great Southern Railroad Company. From a decree in favor of plaintiff, defendant appeals.

This was a bill in chancery to abate a unisance and to recover damages on account thereof. The pleadings and amendments are sufficiently set out in the opinion, and the facts upon which the opinion is rested sufficiently appear therein

GOODHUE & BLACKWOOD, for appellant.—The bill is multifarious.—*Alexander v. Alexander*, 85 Va. 353; *Fielder v. Davis*, 17 Ala. 425; *Meacham v. Williams*, 9 Ala. 847. The bill does not make out a case to enjoin a trespass.—*Voulla v. N. O. M. & T. R. R. Co.*, 55 Ala. 488; *Hammond v. Winchester*, 82 Ala. 470. Where a nuisance results from several persons acting separately they cannot be joined as defendants in an action for damages.—14 Ency. of P. & P. 1108; *Stone v. Dickenson*, 81 Am. Dec. 727; *Lovejoy v. Murray*, 3 Wall. 1; *Livingston v. Bishop*, 3 Am. Dec. 330; *Seither v. Philadelphia Traction Company*, 11 Am. St. Rep. 905. A release of one or more joint tortfeasors executed in satisfaction of a tort is a discharge of them all.—*McCoy v. L. & N. R. R. Co.*, 40 South. 106; *Floyd v. Ritter*, 56 Ala. 356; 24 A. & E. Ency. of Law, 306; authorities supra. The decree rendered as to the other tortfeasor furnishes a full and complete valuable consideration for its release.—*County Court v. Hall*, 51 W. Va. 269; 6 A. & E. Ency. of Law, 704 and 723; *Boggan v. Cant*, 30 Ala. 279; *Allen v. Prater*, *Ib.* 458; *Wyatt v. Evans*, 52 Ala. 285; *Northern Liberty Market Co. v. Kally*, 113 U. S. 199; *Honeyman v. Jarvis*, 79 Ala. 318. The plaintiff was estopped by her own action to recover for any injury.—21 A. & E. Ency. of Law, 723; *Clifton Iron Co. v. Dye*, 87 Ala. 468; *Burkham v. Ohio R. R. Co.*, 122 Ind. 344; *Hulme v. Shreve*, 4 N. J. Eq. 116; *Carlisle v. Cooper*, 21 N. J. Eq. 591; *Williams v. Earl of Jersey*, 1 Cr. & Ph. 91; *Leonard v. Spencer*, 10 N. Y. 338; *Lynch v. McNally*, 73 N. Y. 347.

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SAM WILL JOHN, for appellee.—The averments of the bill and the evidence show that the injury complained of was continuous, constantly recurring, and, therefore, irreparable.—*Ninninger v. Norwood*, 72 Ala. 281. The water was shown to be surface water and was entitled to flow naturally.—*Crabtree v. Baker*, 75 Ala. 93; *Farris & McCurdy v. Dudley*, 78 Ala. 126; *Hughes v. Anderson*, 68 Ala. 280; *S. A. & M. Ry. Co. v. Buford*, 106 Ala. 311; *Ninninger v. Norwood*, *supra*. There was no exception taken to the report of the register and it was received as true.—*Mahone v. Williams*, 39 Ala. 225. This court is concluded, therefore, by the findings of the register.—*Nunn v. Nunn*, 66 Ala. 35; *Bellinger v. Lehman, Durr Co.*, 103 Ala. 387. The bill is not multifarious.—*Truss v. Miller*, 116 Ala. 494; *Kennedy v. Kennedy*, 2 Ala. 571.

HARALSON, J.—The bill was filed by the complainant to abate a continuing nuisance created on her lands by the Alabama Great Southern Railroad Company, and incidentally thereto, to recover the damages inflicted upon her and her property by said nuisance.

By the averments of the bill, the complainant owned and occupied as a home, a fiveacre tract of land, in shape a parallelogram, at the foot of Lookout Mountain; that the northern end of the tract was much higher than the southern, and that there was a ridge, running north and south through the center of the land, so that it dipped towards the south and towards the east and west.

It was further averred, that the Rome & Decatur Railroad Company condemned a right of way across the southern end of complainant's said land, and built thereon a railroad on a high embankment and afterwards, the Southern Railroad Company became the owner of the railroad, and was operating it at the time of the injuries complained of by complainant. Two embankments were built on the right of way of the railroad across complainant's land, the one first referred to, constructed by the Rome & Decatur road, which the Southern Railroad Company came to own and possess, and the other, by the Atlanta Railroad Company, which

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road was afterwards leased to the defendant, the Alabama Great Southern Railroad Company.

The last embankment was built by the latter company parallel with, and up to or abutting the first, so that when completed, the two formed a solid embankment running east and west over the lands of complainant and other lands. On each embankment railroad tracks were laid. The first of these embankments, the one that the Southern Company came into control and possession of, was pierced by an opening or culvert for the passage of storm or rain water, which came down from the mountain side, along and through a natural depression in the surface of the earth, and is called the Patrick ditch or culvert. This culvert was at a point about 250 feet east of the east line of complainant's land. For years, as is alleged and shown, this culvert, or water way, was kept open and the storm water which fell on the mountain side, on the lands of other persons, flowed through the culvert to lower lands lying south of said railroad embankments, and then flowed into a natural drain, and thence into Black creek

It is alleged, that in constructing this last named embankment, by the Alabama Great Southern Railroad Company, there was left through or under it, over the Patrick ditch, a water way for the rain or storm waters to flow from above, into the Patrick ditch, and for several years all the waters which came down the mountain, passed through said opening by way of their accustomed and natural channels, into Black creek. Averment is made, that some time in 1897, from neglect of those whose duty it was to keep it open, said culvert began to fill up, and in 1898 became entirely closed, so that no water could pass or flow through it, and it was thrown on to complainant's land, and deposited soil or earth to the injury of complainant, and overflowed and greatly damaged a fine sulphur spring on her land of known medicinal properties; that it carries away large quantities of her soil and collects and gathers up large quantities of water, soil, stones and trash, together with filth from privies located over said ditch, above the land of complainant, all from the lands of others, depositing large quantities thereof in and



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upon the southwestern part of complainant's land. etc. It is averred, that to relieve this situation, the Alabama Great Southern Railroad Company cut a ditch along the northern side of its embankment and at the foot thereof, and inside its right of way, across the lands of complainant, and then backed the water up and emptied it into Black creek above the railroad track.

The bill was demurred to on many grounds, some of which will be noted, which demurred was overruled.

By an amendment of the bill,, of the 21st of March, 1902, it is averred: "That much of the greater part, if not the whole of these injuries are due directly to the cutting of said ditch along the north side of said double embankment, by the defendant, the Alabama Great Southern Railroad Company, and complainant does not seek to recover damages therefor of, or from the other defendant, the Southern Railway Company in this case, but avers that it is the duty of said Southern Railway Company to reopen or restore the water way under its track over said Patrick ditch, and place it in such condition, as that it will be of sufficient capacity to carry through it, all the water that flowed through that opening, before said company allowed it to fill up."

On the same day, a consent decree between plaintiff and defendant was entered, by which it was "decreed that the Southern Railway Company is not, and shall not be held liable for any damages heretofore inflicted upon complainant or her property arising from any of the matters and things complained of in complainant's bill and amended bills of complainant; and it is further agreed and decreed, that as to the other matters complained of in said bill and amended bills, the complainant, as against said Southern Railway Company, is not entitled to recover, and that the defendant Southern Railway Company, have and recover judgment of complainant for all the lawful costs in this behalf expended, to be taxed by the register of this court, for which let execution issue."

It is also set up in the amended sixth section, as a distinct complaint against the Alabama Great Southern Railroad Company, that in building a bridge across Black creek for the track controlled by said railroad

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company, it was done in such manner as to reduce the open way for water to flow down said creek, so that when the Alabama Great Southern Company cut said ditch, it did it in the manner described in said amended section 6, and in a manner to cause a bar in said creek, which caused its water to back onto complainant's lands, overflow her springs and cause her great damage.

The injuries complained of are brought forward in a way to show that they are permanent, continuous and constantly recurring. In such case, they constitute a nuisance against which a court of equity will grant relief, although there may be a remedy at law, since it would obviously be inadequate.—*Ninninger v. Norwood*, 72 Ala. 277, 47 Am. Rep. 412.

The water flowing from the mountain side, above complainant's land, through the depression called the Patrick ditch, under the first embankment, erected by the Rome & Decatur road, was surface water, and should have been allowed to flow off naturally. The burden was on the lower land to thus receive it, and there was no right in the owner of the higher land, by artificial obstruction designed for its improvement to relieve it from its natural disadvantages, to increase the burdens of the lower estate.—*Crabtree v. Baker*, 75 Ala. 94, 51 Am. Rep. 424; *Hughes v. Anderson*, 68 Ala. 280, 44 Am. Rep. 147.

"A railroad company has no more right to obstruct the natural flow of water by an embankment or other artificial means, or by the collection of water into an artificial channel, forcing or conducting it to a discharge upon the lands of another, than it has, in the same way, to dispose of water from water courses; and it is as liable for resulting damages in the one case as in the other."—*S. A. & M. R. R. Co. v. Buford*, 106 Ala. 312, 17 South. 395.

The bill we doubt not, has equity, and the motion to dismiss for want of equity, was properly overruled.

The objection for multifariousness was properly taken by demurrer, for a bill may contain equity and yet be multifarious.—3 Mayfield's Dig. 290, §§ 2104, 2105. Multifariousness "is generally understood to indicate those cases where a party is brought in as a defendant

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on a record, with a large portion of which, and in the case made by which, he has no connection whatever.”—*Adams v. Jones*, 68 Ala. 117.

Again: “It is described generally, as the joinder of different and distinct and independent matters, thereby confounding them, or the uniting in one bill, of several matters, perfectly distinct and unconnected against one defendant; or the demand of several matters of a distinct and independent nature against several defendants in the same bill.”—*Truss v. Miller*, 116 Ala. 505, 22 South. 863; *Alexander v. Alexander*, 85 Va. 363, 7 S. E. 335, 1 L. R. A. 125; *Mecham v. Williams*, 9 Ala. 847.

The complainant has three distinct grievances against the two railroad companies disconnected from each other: First, of the distinct and separate action of the Southern Company alone, in permitting its culvert, the Patrick ditch, to become filled up from its own neglect; second, of the separate and distinct action of the Alabama Great Southern Railroad Company, in digging a ditch on the north side of the embankment; and third, of the separate and distinct action of the latter road, in building its bridge over Black creek.

On these grounds the bill, according to the generally recognized doctrine, it may be, might be declared to be multifarious and liable to the demurrer interposed to it. It was, however, relieved of this objection, by amendment filed on the 21st of March, 1902, as has already been shown, and by the said decree of the same date, which was entered by complainant's consent. This decree was approved by the solicitors of the complainant and the Southern Company, and was the equivalent of a dismissal of the bill against the Southern Company. When this was done, the other defendant, the Alabama Great Southern Company, against whom alone the bill was retained, had no reason to complain of the bill as being multifarious. It is argued that this is not true, since the complainant dismissed her bill for a valuable consideration, and that a dismissal against one tortfeasor, was a dismissal as to the other. There is, however, no evidence of a dismissal by complainant for a valuable consideration, and the Southern Company was

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not a tort-feasor in the acts committed by the other company, of which complaint is made.

One of the witnesses, Peter Youngman, testified, that complainant directed that the ditch, north of the upper embankment, cut by the Alabama Great Southern Company, should be cut, and said she wanted something done with the water; that she wanted the water carried off either by cutting the ditch or by the culvert through the Southern Railway. From this circumstance it is insisted, that complainant cannot now complain of any damage caused by the cutting of that ditch since she directed it to be cut. But this, it is submitted, is a strained and unwarranted construction of complainant's language touching the digging of the ditch. All she meant, and all her language imports she meant was, that she insisted as she had a right to do, that the defendant should do something to relieve her of the damage it was inflicting on her. She had no right to direct the defendant in the matter, for the defendant was not subject to her control.

We have considered all the questions which occur to us to be of importance to notice, and finding no error in the decree below it is affirmed.

Affirmed.

TYSON, C. J., and SIMPSON and DENSON, JJ., concur.

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### *Bill to Forclose Mortgage.*

(Decided March 2, 1907. 43 So. Rep. 368.)

1. *Limitation of Action; Part Payment.*—The payment of interest on a note secured by a mortgage relieved both note and mortgage from the operation of the statute of limitations.
2. *Mortgages; Equitable Mortgage; Intention of Parties.*—Although a conveyance may fail as a mortgage in conveying the legal title, where it is shown that it was the intent of the parties

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to the instrument that it should operate as a lien on certain land to secure the payment of borrowed money a court of equity will give such instrument effect as an equitable mortgage.

3. *Tenancy in Common; Adverse Possession; Hostile Character.*—Where four persons own land as tenants in common, and two of them agree among themselves upon a division of the land between themselves, no change of title is effected, and the continued possession of one part of the land by one of the parties to the division, without actual ouster of his co-tenants, does not constitute an adverse holding as to them.
4. *Same; Judicial Sale; Notice of Change of Ownership.*—The undivided interest of one of the tenants in common was sold under execution at a sheriff's sale. The share was purchased by a co-tenant, who conveyed it to the wife of the execution co-tenant. The conveyance to the wife was not recorded and she and her husband continued to occupy the land just as before the sale of the husband's interest, and its conveyance to her. Held, there was not such notice of change of ownership or possession as to entitle the wife to claim any right by adverse possession.
5. *Schools and School Districts.—School Funds; Investment; Retroactive Statutes; Curative Acts.*—If no contract or vested rights are violated or impaired the ultra vires act of the school commissioner in making a loan on real estate is remedied by an act of the legislature ratifying the same, where the legislature has power in the first instance to authorize school commissioners to make a loan on real estate.
6. *Constitutional Law; Impairing Obligation of Contracts.*—The Act of March 2, 1901, (Acts 1900-01, p. 2070) affords a remedy for the enforcement of the contract instead of destroying or impairing the remedy, and hence is not violative of article 4, section 56, Constitution 1875.
7. *Statutes; Amendments; Constitutional Requirements.*—Article 4, Sec. 2, Constitution 1875, applies only to amendments, which without the presence of the original act, are unintelligible, and hence, the act of March 2, 1901 (1900-01, 2070) is not repugnant to or violative of the Constitution, either as to its amendment or that it shall contain but one subject which shall be clearly expressed in the title.
8. *Schools and School Districts; Offices; Ultra Vires Contract; Curative Act.*—Sections 3 and 4 of the Act of March 2, 1901 (Acts 1900-01, p. 2070) ratify the ultra vires act of the commissioner in making the loan in this instance, and empowers their successors, the trustees, to enforce the loan contract.

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APPEAL from Lawrence Chancery Court.

Heard before Hon. W. H. SIMPSON.

Bill by B. T. Etheredge and others against Robert G. Courtner, administrator. From a decree for plaintiffs, defendant appeals.

KIRK, CARMICHAEL & RATHER, and C. S. SHERROD, for appellant.—The trustees have no right to maintain the bill in their own name.—*Lamb v. Pioneer S. & L. Co.*, 106 Ala. 591. Signing the name of an attesting witness to a note or bond by the agent of the obligee or payee is a material alteration and discharges the obligor.—*White Sewing Machine v. Saxon*, 121 Ala. 399; *Anderson v. Bell*, 87 Ala. 334; *Montgomery v. Crosscathie*, 90 Ala. 553; *Ex parte Sayre*, 95 Ala. 288; *Sharpe v. Orme*, 61 Ala. 263. The adding of an acknowledgement to a mortgage without the knowledge and consent of the mortgagor is a material alteration of the instrument.—*Alabama State Land Company v. Thompson*, 104 Ala. 573; 121 Ala. 399; 87 Ala. 334; 95 Ala. 288. A conveyance of land held adversely to the grantor is void as to such adverse holder or those claiming under him.—*Murray v. Hoyle*, 92 Ala. 559. The validity of acknowledgements can be impeached by showing that the officer who took it had no jurisdiction of the parties.—*Mortgage Co. v. Payne*, 107 Ala. 578. A clerk appointed by a probate judge has no authority to take any acknowledgements.—*Pioneer S. & L. Co. v. Barclay*, 108 Ala. 155. The acknowledgement was a nullity.—*Griffith v. Ventress*, 91 Ala. 366; *Grider v. A. L. F. M. Co.*, 99 Ala. 281. The acknowledgement cannot operate as an attestation.—*Holleman v. Denyes*, 51 Ala. 95. The mortgage was barred by the statute of limitations of twenty years.—*McArthur's Case*, 32 Ala. 35; *Lee v. Thompson*, 99 Ala. 95; *Coyle v. Wilkins*, 57 Ala. 108. The contract is *malum in se* and will not be enforced.—*Whetstone v. Bank of Montgomery*, 9 Ala. 282; *Brooklyn L. & I. Co. v. Bledsoe*, 52 Ala. 551. The mortgage is void because executed while another was in adverse possession.—*Pearson v. King*, 99 Ala. 125. The acts of 1900-01, are violative of section 2 of article 4 of Constitution of 1875.—*Harper v. The State*, 109 Ala. 28; *Rice v. Westcott*,

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108 Ala. 353; *Miller v. Perry*, 101 Ala. 531; 70 Ala. 145. The contract being void the statute cannot give it validity.—Cooley's Const. Lim. p. 465 and note to p. 469.

W. P. and W. L. CHITWOOD, for appellee.—The part payments on the note and mortgage recognized its validity and took it without the statute of limitation.—*Cameron v. Cameron*, 25 Ala. 344; Sec. 2811, Code 1896; 13 A. & E. Ency. of Law, 756. The mortgage was good in equity and enforceable.—*Newton, Findlay & Co. v. McAfee*, 64 Ala. 357; *Smith v. Hiles, et al.*, 107 Ala. 273. Galey was a de facto officer when he took the acknowledgement.—4 Mayf. Dig. 341. The trustees had a right to bring this suit under the act of March 2, 1901.—Acts 1900-01, p. 2070. This act is constitutional.—§ 56, article 4, Const. 1875; *Edwards v. Williamson*, 70 Ala. 145; *Osborn v. Johnson, et al.*, 99 Ala. 309. The act does not contravene section 2 of article 4 of the Constitution.—*State ex rel., etc. v. Rogers*, 107 Ala. 444; *Birmingham Union Ry Co. v. Elyton Land Co.*, 114 Ala. 70; *City of Montgomery v. National B. & L. Asso.*, 108 Ala. 336; *Burton v. The State*, 107 Ala. 108; *Railroad Co. v. Pike County*, 97 Ala. 105; *State ex rel., etc. v. McTary, et al.*, 128 Ala. 135. There was no element of adverse possession on the part of Carrie Ashford.—*Stiff v. Cobb*, 126 Ala. 381; *Ashford v. Ashford*, 34 South. 10. In the absence of proof to the contrary it will be presumed that the commissioners or trustees had authority to make the loan.—*Alabama G. L. Ins. Co. v. Central A. & M. Asso.*, 54 Ala. 73. The doctrine is not applicable to an executed contract.—2 Mayf. Dig. p. 769; 27 A. & E. Ency. of Law, 263. In any event the contract is ratified.—*Ala. Nat. Bank v. O'Neal*, 128 Ala. 192. The act of 1901 vested the power in trustees to collect debts heretofore contracted.—*Lovejoy v. Beason*, 121 Ala. 608; *State ex rel. Sanche v. Webb*, 110 Ala. 214; *Ex parte Buckley*, 54 Ala. 55. When the words of the statute or the clear legislative intent is that the act shall be retroactive it will be so held.—*Smith v. Kolb*, 58 Ala. 645; *Esbridge v. Dctman*, 51 Ala. 250.

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DOWDELL, J.—The present bill is one against the heirs at law of E. C. Ashford, deceased, and for the purpose of foreclosing a mortgage given by said E. C. Ashford during his lifetime to secure the payment of his promissory note for borrowed money. The note and mortgage were made payable to W. C. Sherrod and others, naming them, as school trustees of township 4, range 8 W., from whom the loan of money was obtained. The bill is exhibited in the name of B. T. Etheredge, L. T. Key, and W. C. Bracken, as school trustees of township 4, range 8, Lawrence county, Ala. Under the act approved March 2, 1901 (Acts 1900-01, p. 2070), the complainants became the successors of W. C. Sherrod and others, to whom the note and mortgage were made payable, and the bill, under the act, is properly exhibited in their names as school trustees of township 4, range 8, etc.

The mortgage sought to be foreclosed was given on an undivided interest in certain described lands, "not less than one-fourth" interest, and, with the note which it was given to secure, bore date of March 5, 1880. The facts show that the loan was made and obtained as averred in the bill, and that the interest was paid annually and credited on the note down to and including the year 1896. These interest payments relieved both the note and mortgage from the operation of the statute of limitations, and saved the note from the bar of the statute of 6 years, as also the mortgage given to secure it from the bar as by prescription of 20 years set up as a defense to its enforcement.—*Cameron v. Cameron*, 95 Ala. 344, 10 South. 506; Code 1896, § 2811, and cases cited; 13 Am. & Eng. Ency. of Law (1st Ed.) 750, 751. There is evidence that tended to prove that the mortgage, when executed and recorded, was neither attested nor acknowledged; but in this case that question is an unimportant one. It was the intention of the parties, as the facts show in the giving of the mortgage, that a lien on the land described should thereby be created to secure the payment of the borrowed money. In such cases, although the instrument may fail as a mortgage in the conveyance of the legal title, still a court of equity will always give effect to such an instrument as an equitable



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mortgage, and thus preserve the lien and security which the parties intended should be created.—*Smith v. Hiles-Carver Co.*, 107 Ala. 272, 18 South. 37; *Newlin Finley & Co. v. McAfee*, 64 Ala. 357; 6 Am. & Eng. Ency. (1st Ed.) 675.

It is insisted that the mortgage is void, as to the part of the lands embraced in it known as the "home place," on the ground, as alleged, which is set up by way of defense in the answer, that this part of the land was held adversely by Mrs. Carrie Ashford, the wife of A. E. Ashford, at the time of the execution of the mortgage by E. C. Ashford. The facts show that the title to all of the lands in question, upon the death of the ancestor, Thomas Ashford, in the year 1862, descended to his four children, A. E. Ashford, T. T. Ashford, E. C. Ashford, and Mrs. Bridenthall. The title, of course, was in these four children, heirs at law of Thomas Ashford, deceased, as tenants in common. Upon the death of the ancestor, A. E. Ashford administered upon his estate, and during said administration he was in possession of the lands. In the year 1867 the said A. E. Ashford and his brother, E. C. Ashford, made a private parol agreement to divide the lands between themselves, the said A. E. Ashford taking the part known as the "home place," and E. C. Ashford the part known as the "free and easy place," and each one taking possession of the part so allotted; and all of this was without the assent or agreement of the other heirs, who were tenants in common with A. E. and E. C. Ashford. In 1874 the undivided one-fourth interest of A. E. Ashford was levied on under execution and sold at sheriff's sale; E. C. Ashford becoming the purchaser at said sale for a nominal sum. In 1875 it is claimed that E. C. Ashford sold the interest of A. E. Ashford that he purchased at sheriff's sale to Carrie Ashford, the wife of A. E. Ashford. No record, however, of any such conveyance, was ever made. A. E. Ashford and his wife, Carrie Ashford, continued in the possession of the part of said lands known as the "home place" from the time of the division by A. E. Ashford and E. C. Ashford of the lands to the death of Carrie Ashford, and after her death the said A. E. Ashford continued in the possession. During all the while A. E.

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Ashford managed and controlled the farm; but it is claimed that he did so as the agent of his wife, Carrie T. Ashford, during her lifetime subsequent to the time of the alleged sale of the said E. C. Ashford to the said Carrie Ashford. It will be observed that this time covered the date of the execution of the mortgage, to-wit, March 5, 1880.

It must be borne in mind, however, that it is only the undivided one-fourth interest of E. C. Ashford as to which the mortgage is sought to be foreclosed. Unless the adverse possession set up is such as might ripen into title by lapse of time, it is not such as would render the execution of the mortgage void. To constitute adverse possession, it must be open, notorious, under claim of title, and must be exclusive; that is to say, it must be adverse to the whole world. The possession of one tenant in common under the law is the possession of all the tenants, and adverse possession by one tenant in common can never arise until there is an actual ouster of the co-tenant. The private parol agreement of division between E. C. Ashford and A. E. Ashford did not and could not pass a title to the land. A. E. Ashford was at the time in possession of the place known as the "home place," and this act of division and his continued possession of the land did not constitute adverse possession by him as against his co-tenants. The legal title, therefore, remained as it was before. As we said above, there was no notice or record evidence of any sale of the land by E. C. Ashford to Carrie Ashford. There was never such change from the possession of A. E. Ashford to his wife, Carrie Ashford, as would give notice to the world of any claim set up by Carrie Ashford. The facts show that E. C. Ashford, when he borrowed the money in 1880 from the school trustees, represented to said trustees that he, the said E. C. Ashford, held and owned an unincumbered title to an undivided fourth interest in said lands. The facts further show that the said trustees had no knowledge or notice of any claim whatever to said lands by the said Carrie Ashford. Under the facts we feel constrained to hold that the possession of A. E. Ashford was never adverse to his tenants in common; that is to say, that his possession lacked the constituent

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elements necessary to ripen it into title by lapse of time. And we are further of the opinion that there was no such outward change of possession from A. E. Ashford to his wife, Carrie Ashford, as would carry notice of a change of ownership or possession. See *Ashford v. Ashford*, 136 Ala. 631, 34 South. 10, 96 Am. St. Rep. 82; *Stiff v. Cobb*, 126 Ala. 381, 28 South. 402, 85 Am. St. Rep. 38.

The respondents set up the defense of ultra vires to enforcement of the contract. The township commissioners who made the loan were incorporated and chartered as such commissioners, under an act of the Legislature approved January 12, 1826, a copy of which said act is made an exhibit to the answer of A. E. Ashford. By this act the school commissioners were authorized to invest the school funds in certain bank stock, but were not authorized to loan the school money as was done in the present instance. The action of the school commissioners in making the loan, as was done here, was undoubtedly in excess of their powers and authority; but the answer to this defense is that the lack of authority and power on the part of the school commissioners to make the loan was remedied and cured by an act of the Legislature of March 2nd, 1901 (Acts 1900-01, p. 2070), by which the contract of loan was ratified. It cannot be disputed that the Legislature had the power in the first instance to authorize the loan just as it was made. The law is well settled in this state that it is within legislative competency by an act to ratify the doing of that which has already been done, the doing of which it had the power to authorize in the first instance, where no contract rights or vested rights are in any way violated or impaired.—*Ex parte Buckley*, 53 Ala. 54; *Lorejoy v. Beason*, 121 Ala. 605, 25 South. 599.

It is insisted by respondents in argument that the act of 1901 is unconstitutional on two grounds. The first is that it violates section 56, art. 4, of the Constitution of 1875. That section reads as follows: "There can be no law of this state impairing the obligation of contracts by destroying or impairing the remedy for their enforcement, and the General Assembly shall have no power to revive any right or remedy which may have been barred

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by lapse of time or by any statute of this state." We are unable to see wherein the obligation of the contract in question has in any manner been impaired by this statute. The statute is a remedial one, affording a remedy for the enforcement of the contract, instead of destroying or impairing the remedy for its enforcement. Such statutes should always receive a liberal construction, and giving it such construction, we are clearly of the opinion that it does not violate any provision of the above section and article of the Constitution.

The second objection is that it is violative of section 2, art. 4, of the Constitution of 1875, which is as follows: "The style of laws in this state shall be, 'Be it enacted by the General Assembly of Alabama.' Each law shall contain but one subject, which shall be clearly expressed in the title, except general appropriation bills and general revenue bills, and bills adopting a Code, digest, or revision of statutes, and no law shall be revised, amended, or the provisions thereof extended on confirmed by reference to its title only, but so much thereof as is revised, amended, or extended or confirmed shall be re-enacted and published at length." The act in question is independent and original in form, and is intelligible without reference to the original act incorporating the school commissioners of township 4, range 8 W., Lawrence county, Ala., and there was no necessity of setting out the original act or any part thereof.—*State ex rel. v. Rogers*, 107 Ala. 444, 19 South. 909, 32 L. R. A. 520; *Birmingham Union Ry. Co. v. Elyton Land Co.*, 114 Ala. 70, 21 South. 314. The title of the act of March 2, 1901, contains in reality but one subject, and in this respect in no way offends constitutional provision. There is nothing in the body of the act which is not cognate or referable to the subject contained in the title.—*City Council of Montgomery v. National Building & Loan Association*, 108 Ala. 336, 18 South. 816; *State ex rel. v. Rogers, supra*; *Burton v. State*, 107 Ala. 108, 18 South. 284; *Ry. Co. v. Pike County*, 97 Ala. 105, 11 South. 732; *State ex rel. v. McCary*, 128 Ala. 139, 30 South. 641.

The act of March 2, 1901, contains the following provision:

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"Sec. 3. That the rights and interests of said school commissioners in all existing contracts and in every species of property of said township are hereby vested in said trustees.

"Sec. 4. That said trustees may exercise the power of sale contained in any and all mortgages or other security held by said school commissioners or vested in them, and may enforce any and all contracts heretofore made by them, any suit or proceeding now pending in the name of said school commissioners may be revived and conducted to final determination in the name of the trustees of said township 4, range 8, Lawrence county, Alabama."

These provisions are sufficiently broad and comprehensive to include the mortgage here sought to be enforced. The language employed in the act, "and may enforce any and all contracts heretofore made by them," receiving that liberal construction which should be applied to such acts, may include not only such contracts as are valid in themselves, but such as may be rendered valid by legislative ratification, and hence sufficient to show an intention on the part of the Legislature in the passage of the act to ratify the contract in question.

From the views above expressed, it follows that the decree appealed from will be affirmed.

**Affirmed.**

TYSON, C. J., and ANDERSON and McCLELLAN, JJ.,  
concur.

[Moses v. Philadelphia Mortgage & Trust Co.]

## Moses v. Philadelphia Mortgage & Trust Co.

### *Bill to Foreclose Mortgage.*

(Decided Dec. 21st, 1906. 42 So. Rep. 868.)

*Mortgages; Right of Foreclosure.*—The land conveyed in trust to secure the bonds was encumbered with a prior lien, and the mortgagor made a money deposit with the trustee to protect the bondholders against the lien. The trustee invested the deposit in some of the bonds secured by the deed of trust. Afterwards the mortgagor assigned the bonds so purchased by the trustee. Held, the assignee of the bonds became a bondholder with all the rights pertaining thereto, subject only to the equities of the other bondholders, arising out of the purpose of the deposit, and such assignee had the right to have the trust deed foreclosed, the property sold, and after the payment of the costs, prior encumbrances and the amount due on the bonds held by other bondholders, the proceeds applied to the payment of the bonds held by him.

APPEAL from Montgomery City Court.

Heard before Hon. A. D. SAYRE.

Bill by John T. Moses against the Philadelphia Mortgage & Trust Company to foreclose a mortgage deed of trust securing certain bonds. From a decree in favor of defendant, plaintiff appeals.

This appeal is from a final decree of the chancellor decreeing that the complainant, Moses, is entitled to "foreclose the mortgage deed of trust set out as an exhibit to the bill in this cause for the security to him of the sum of \$500, with interest at the rate of 6 per cent. from the date when the bonds secured thereby became due according to their terms, and fair and just compensation for attorney's fees in and about the prosecution of this suit; regard being had to, among other things, the amount for which complainant is entitled to foreclose, and sale to effect the same. No bid will be re-

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ceived for the property unless in excess of the sum of \$72,000, and unless upon an offer, under fair conditions of sale, of a sum exceeding \$72,000, some amount is realized for the satisfaction of complainant's claim, this bill will be dismissed; such being, in the opinion of the court, the necessary result, in the present circumstances of the case, of the rulings heretofore made that complainant, as against other bondholders, is entitled to foreclose rather than to redemption, and the court doth so decree. It is therefore ordered, adjudged, and decreed by the court that the register will hold a reference to ascertain: (1) What amount will be due to the complainant on the day of his report and his bonds, estimating his interest therein at the sum of \$500 due upon the day upon which said bonds fell due according to their terms, and bearing interest at the rate of 6 per cent. per annum until the day of the report. (2) What would be a fair and just compensation to complainant for attorney's fees in and about the foreclosure of the mortgage deed of trust aforesaid, regard being had, among other things necessary and proper to be considered, to the fact that complainant is entitled to have decreed a foreclosure for the amount of his own debt only." This case has been here twice before on appeal, and the facts are very fully stated in 131 Ala. 554, 32 South. 612, where the reader can refer, if found necessary or desirable. The other report of the case is in 127 Ala. 433, 29 South. 463. Reference is here made to the facts therein set forth.

THOMAS H. WATTS, ALEXANDER TROY, CLIFFORD LANNIER, JR., and GUNTER & GUNTER, for appellant.—No brief came to the reporter.

R. E. STEINER, and J. M. CHILTON, for appellee.—No brief came to the reporter.

SIMPSON, J.—As this case has been before this court twice, the facts need not be restated in this opinion.—127 Ala. 433, 29 South. 463; 131 Ala. 554, 32 South. 612. The Montgomery Real Estate Association owned the Moses Building, and issued its bonds for

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\$80,000, securing the same by a deed of trust to the appellee as trustee, and placed the bonds in appellee's hands to be sold. The bonds state, on their face, that \$8,000 had been deposited with the trustee to secure the payment of the Sloan debt, which was a lien prior to the bond debt. That \$8,000 was invested by the trustee, with the approval of the mortgagor, in said bonds at par. Then the status was that said real estate company owed the entire \$80,000, but that \$8,000 of the bonds were owned by the mortgagor himself, and held by said trustee in trust to secure the Sloan debt. The only effect of this was that the holders of the \$72,000 of bonds took them with notice of the prior lien of the Sloan debt, but also with the assurance that \$8,000 was held by the trustee to secure that debt, and that amount could not be withdrawn until that debt was paid, so long as the bonds were outstanding. When Wright bought at execution sale, he became the owner of the equity of redemption, subject to all the prior liens and incumbrances on the property, to-wit, the Sloan debts and the \$80,000 bonded indebtedness. As stated in this case in 131 Ala. 554, 32 South. 612: "He had (has) no equity to have the Sloan debt paid out of the deposit, or to have the deposit first applied, or applied at all, to the extinguishment of any portion of the debt evidenced by the bonds and secured by the mortgage. \* \* \* In short, a sale of the mortgaged property under execution was not a sale of the deposit, and therefore the purchaser, Wright, at the sale, acquired no interest whatever in the deposit."—131 Ala. 561, 562, 32 South. 615.

It is true, as contended by appellee, that when the purchaser of the equity of redemption, for the protection of his interest, pays off incumbrances which are prior in right to another incumbrance, he has a right, in equity, to keep these incumbrances alive for the purpose of insisting on their priority to the outstanding incumbrance, so that, in case of the sale of the property under the last incumbrance, he would have the right to have the proceeds applied first to the payment of the incumbrances which were superior to the outstanding one, and, if the property did not bring enough to pay both, the last incumbrance would be scaled accordingly.—2



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Pom. Eq. Jur. 791; 3 Pom. Eq. Jur. 791; 3 Pom. Eq. Jur. 1212; *Millspaugh v. McBride*, 7 Paige, Ch. (N. Y.) 509; *Ohmer v. Boyer*, 89 Ala. 273, 280, 7 South. 663. Admitting, then, that the subsequent purchase by Wright of the \$72,000 of bonds could not operate as a merger to the extent of depriving Wright of the aforementioned equitable rights, and that by the purchase of said bonds he became entitled to all the rights and securities held by the original holders of said bonds, then what were those rights and securities? The real estate company warranted the title as free of incumbrances, except as to the annuity due to Mrs. Sloan, and, in order to save the bondholders harmless from that, the \$8,000 of bonds were deposited. The effect of this was, not to appropriate the \$8,000 to the payment of said debt, but to leave it in pledge until the property was sold, and if, at said sale, the property brought enough to pay the amount due Mrs. Sloan and any other incumbrance, such as that due to Mrs. Sloan, and also the whole amount of the bonded indebtedness, then the bondholders had been saved harmless, and the \$8,000 (whether in money or bonds) was released from the pledge. If, on the other hand, the property did not bring enough to thus hold the bondholders harmless, the \$8,000 which had been deposited for that purpose would be applied as far as necessary to make up the deficiency. It is not a question of setting off the indebtedness of the real estate company against the amount due on the bonds, for Wright has never acquired any personal claim against the real estate company, except by virtue of his ownership of the \$72,000 of bonds, and the extent of that was only that prior incumbrances should not impair the value of said bonds. The \$500 paid by complainant on the purchase of said \$8,000 of bonds has nothing to do with this case. That simply is a part of the purchase money paid by him for the bonds, and he owes the realty company the balance of the purchase money.

While the agreements in the case seem to indicate that the property is worth largely more than enough to pay off the prior incumbrances and the entire bonded indebtedness, yet the court can only declare the rights and priorities of the parties, and according to the view

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of this court, it will be the duty of the city court to ascertain: (1) What amounts are due the heirs of said Wright on account of payments made on both of the Sloan debts; (2) what amount is due on the \$72,000 of bonds held by the heirs of Wright; (3) what amount is due on the \$8,000 bonds held by the complainant; (4) what will be a reasonable attorney's fee to be allowed to complainant's attorneys for foreclosing said mortgage, having reference only to the amount due on complainant's bond. Said court, after ascertaining these matters, will order the property to be advertised and sold in accordance with the terms of the deed of trust, and shall appropriate the proceeds of said sale: (1) To the payment of costs of court; (2) to the payment of all amounts due the heirs of said Wright on account of payment by said Wright of said prior incumbrances; (3) to the payment of the amount due on said \$72,000 of bonds held by the heirs of said Wright; (4) to the amount due on the \$8,000 of bonds held by complainant, and the amount of attorney's fee allowed to complainant's solicitor. The residue of said purchase money shall be paid to said heirs of said Wright. The judge of said city court shall make such other orders and decree as may be necessary for the vesting of title in the purchaser, and such other matters as may be necessary to wind up and conclude the case.

Reversed and remanded.

TYSON, C. J., and HARALSON and ANDERSON, JJ., concur.

[Brock & Spight, et al. v. Oliver.]

## **Brock & Spight, et al. v Oliver.**

### *Bill to Declare a Mortgage a Preferential Payment.*

(Decided March 2, 1907. 43 So. Rep. 357.)

1. *Equity; Jurisdiction; Adequate Remedy at Law.*—Chancery is without jurisdiction to grant relief against a mere preferential payment where the trustee has not exhausted his remedy at law.
2. *Bankruptcy; Fraudulent Transfer; Action to Set Aside.*—The bill averred that a certain mortgage was fraudulently given and that the said mortgage had been fully paid on and discharged before the filing of the bill. Held, a bill to declare a fraudulent preference was not maintainable as a bill to set aside a fraudulent conveyance or transfer under section 818, Code 1896, as the mortgage was *functus officio*.

APPEAL from Morgan Chancery Court.

Heard before Hon. W. H. SIMPSON, Chancellor.

Bill by C. A. Oliver, as trustee in bankruptcy, against Brock & Spight and others. From a decree in favor of plaintiff, defendants appeal.

The bill in this case was filed by Oliver, as trustee in bankruptcy for B. A. Nichols, whom the bill alleges was adjudged a bankrupt on February 15, 1904. The bill alleges an execution of a mortgage by Nichols to Brock & Spight, covering all of his property except his merchandise, and assignment by said mortgage of a large number of his notes, mortgages, and choses in action, and in the year 1903 a chattel mortgage on all his notes and mortgages given for supplies furnished, including all the accounts and notes not included in a list furnished said Brock & Spight the previous year. It is alleged that the mortgage recited an indebtedness of \$2,000, which was not then owing and was to fall due October 15, 1903, and was designed to cover every debt that might accrue to Nichols through sales of merchandise and otherwise, and every other article than merchandise, yet allow Nichols the unrestrained use, dispo-

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sition, collection, and enjoyment of the proceeds. It is alleged that Nichols paid but little, if any, of his indebtedness, except to Brock & Spight— but instead added to his liability, and yet paid said Brock & Spight a large amount in excess of their said mortgage. The amounts and dates of the payment are set out in the bill and it is alleged that they were all made within the four months prior to the declaration of bankruptcy. It is also alleged that the estate is insolvent and the already proven debts are greatly in excess of the assets of the estate. Motion was made to dismiss the bill for want of equity, and demurrers were interposed to the bill. The motion and demurrers were overruled, and from this decree this appeal is prosecuted.

MARVIN WEST, for appellant.—Advances made in good faith to a debtor to carry on business on security taken at the time do not violate either the terms or the policy of the bankrupt act.—*Darby v. Boatman*, 1 Dillon 141; 5 Cyc. 289. Payments made by the debtor at various times to one who has made advances to an insolvent debtor, not knowing of his insolvency to enable him to carry on his business are not preferential under the bankrupt act.—*Jaquith v. Alden*, 189 U. S. 78.

W. T. SANDERS and E. W. GODBY, for appellee.—The destruction of the mortgaged choses, and the dissipation and confusion of the proceeds, rendered the creditors merely creditors without a lien.—*Iron & Supply Co. v. Rolling Mill Co.*, 11 Am. Bankruptcy Rep. 202; 125 Fed. Rep. 974; *American Lumber Co. v. Taylor*, 14 Am. Bankruptcy Rep. 231; 137 Fed. 321.

The mere fact that Nichols was insolvent conclusively shows a preference; and knowledge of the insolvency is reasonable cause to believe a preference was intended, whether they did believe it or not.—*Toof v. Martin*, 80 U. S. 40; 20 L. Ed. 483; *Buchanan v. Smith*, 83 U. S. 310; 21 L. Ed. 286; *Collier on Bankruptcy*, 5th Ed. 459; *Lovelady on Bankruptcy*, 468; *In Re Virginia Hardwood Mfg. Co.*, 15 Am. Bankruptcy Rep. 138; 139 Fed. 209.

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It is immaterial whether the debtor actually intended any preference or not—*infra*, 9-10; *Western T. & T. Co. v. Brown*, 12 Am. Bankruptcy Rep. 116; 129 Fed. Rep. 728; *Pirie v. Chicago T. & T. Co.*, 182 U. S. 438; *Benedict v. Deshel*, 11 Am. Bankruptcy Rep. 25; 177 N. Y. 1; Collier on Bankruptcy, 5th Ed. 459-460; *In Re Phillip Jacobs*, 1 Am. Bankruptcy Rep. 524.

Trustee need not represent claims older than preferential payments.—Collier on Bankruptcy (5th Ed.) 461; *Anniston Case*, *supra*; *In Re Marine Construction & D. D. Co.*, *supra*; Bankrupt Act, Sect. 60, subdivision B; *Beers v. Hanlin*, 3 Am. Bankruptcy Rep. 746. The retention, use, collection and conversion of the mortgaged property by the debtor, as well as the commingling of the whole, rendered the mortgage fraudulent, *infra* 13-16; *In Re Marine Const. & D. D. Co.*, 14 Am. Bankruptcy Rep. 475, 130 Fed. 446; *Means v. Dowd*, 128 U. S. 273; 32 L. Ed. 435.

The power over use and enjoyment of the mortgaged property, by the mortgagor, determines the fraudulent character of the instrument, wholly apart from the property itself.—*In Re Marine Const. & D. D. Co.*, *supra*; *Christian & Craft Gro. Co. v. Michael*, 25 So. Rep. 573; *Cross v. Berry*, 31 So. Rep. 36; *Bank v. McDonnell*, 87 Ala. 743; *Robinson v. Elliott*, 89 U. S. 513, 22 L. Ed. 763. The mortgage was fraudulent even as to subsequent creditors (and on this further ground it is immaterial whether trustee represented those to whom an indebtedness had accrued when preferential payments were made or not.—*Cross v. Berry*, 31 So. Rep. 36, 14 Ala. 84; *Christian, etc. v. Michael*, 25 So. 573, 32 Ala. 92; *McDermott v. Ebon*, 90 Ala. 261.

Equity is the forum for redress, recovery of preferential payments and annulment of mortgage.—*Bardes v. Bank*, 44 L. Ed. 1181, 178 U. S. 531; Collier on Bankruptcy, 461-462 (5th Ed.); *Wright v Skinner*, 14 Am. Bankruptcy Rep. 501-502, 136 Fed. 694; Loveland on Bankruptcy, pages 488-489.

ANDERSON, J.—The sole purpose of this bill is to have certain payments made by the bankrupt declared preferential and void under the bankrupt act. The

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chancery court is without jurisdiction to grant relief against a mere preference at the instance of one who has not exhausted his remedy at law.—*Redd v. Wallace*, 145 Ala. 209, 40 South. 407. The bill does not bring this case within the influence of section 818 of the Code of 1896, as it in no sense seeks to set aside a fraudulent conveyance or transfer. It does aver that a mortgage was fraudulently given, but also shows that the mortgage was fully paid and discharged before the bill was filed, and is therefore functus officio.

The chancellor erred in not dismissing the bill for want of equity, and the decree is reversed, and one is here rendered dismissing the bill.

Reversed and rendered.

TYSON, C. J., and DOWDELL and McCLELLAN, JJ.,  
concur.

## Brooke v. Tucker.

*Bill to Dissolve Partnership and for an Accounting.*

(Decided Feb. 14, 1907. 43 So. Rep. 141.)

1. *Partnership; Contract; Communion of Profit and Loss.*—Under a contract by which one party put \$100.00 in to the business to be applied to certain indebtedness, both parties were to work together for the interest of the business, and the profits to be divided one-third to each party and one-third to go to the liquidation of certain debts, such parties were partners *inter se*, although by the same contract one was regarded as the owner of the business and was to remain in control of the business until the formation of a corporation contemplated by the contract.
2. *Same; Accounting; Dissolution; Receivers.*—The allegations of the bill that the defendant partner was insolvent, and that he had collected money due the firm which he had appropriated to his own use without making entry thereof on the partnership books, and without acquainting his partner of the facts,

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are sufficient when supported by proof to warrant a decree of dissolution and the appointment of a receiver.

3. *Same: Title to Partnership Property.*—The fact that under the contract of partnership the respondent partner has the legal title to the partnership property, is no obstacle to the appointment of a receiver, when such partner has converted profits to his own use in which complainant partner had an interest and to which such complainant partner had contributed money.
4. *Receivers; Premature Appointment; Objections; Waiver.*—Although defendant partner submitted demurrers to the application for a receiver and filed affidavits against the appointment and thereafter appealed to the chancellor from the order of the register appointing the receiver, he waived his right to insist that the appointment was premature, because appointed by the register before answer filed, when he filed his answer before the chancellor as part of the proofs against the application, on appeal to the chancellor.

#### APPEAL from Crenshaw Chancery Court.

Heard before Hon. W. L. PARKS.

This was a bill praying that a reference be held to state an account between complainant and respondent so far as their connection with the business of the Crenshaw County Critic is concerned; that the register on said reference ascertain and report to the court the amount of indebtedness now due upon the mortgage made by the said Brooke to the Bank of Luverne, and also the amount due upon the mortgage made by said Brooke to B. S. Griel, T. W. Shows, J. F. Walker, J. A. Bell, Joseph F. Johnson, A. H. Hill, and A. A. Wiley; that an order be made for the sale of the property of said Crenshaw Critic subject to the mortgage thereon, and such other orders as may be necessary to dissolve and wind up the partnership between complainant and the said Brooke. The allegations of the bill are: That on the 29th day of August, 1902, complainant and respondent Brooke formed a partnership for the purpose of conducting and operating a newspaper and job office under the name of the "Crenshaw Critic," under articles of co-partnership, a copy of which is attached to the bill as an exhibit and which is as follows: "That the undersigned have associated themselves to-

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gether for the publication of the Crenshaw County Critic, under the following terms, to-wit: (1) M. Tucker is to put into said business \$100, which is to be applied to paying off the indebtedness hereinafter set forth. (2) Brooke is to be the editor and proprietor until the consummation and formation of a stock company, when stock shall be allotted in accordance with the interest of the said Tucker and Brooke; it being understood that at the time of the signing of this agreement that Brooke is the sole owner of the Crenshaw County Critic and the material and appurtenances thereto. (3) Said Tucker and Brooke shall work together faithfully and diligently for the good of said Critic, and in all things said Brooke to have control. The profits of the enterprise to be divided as follows: One-third to Tucker and one-third to Brooke, and one-third to the liquidation of the debts due to Damon & Peets, the Inland Type Foundry, and to the personal notes held against Brooke by divers persons, amounting in all to \$600. (4) After these sums shall have been paid, there shall be formed an incorporated stock company in the sum of one thousand dollars, the shares to be one hundred dollars each; said Tucker to have four of the shares, and said Brooke to have six of the shares. (6) This contract is null and void if either of the parties neglect the business of the Critic from drunkenness. (6) All subscription money received shall not come under the operation of clause 3 of this contract, as regards division, until after one year from the date of the first issue of the Critic, but the money paid on subscription may be used for the current expenses of the paper. (7) No more than thirty dollars in any one month shall be drawn by said Tucker or Brooke under clause 3 of this contract (unless by mutual consent). (8) Either party of this contract may withdraw from it by giving thirty days' notice to the other and paying him what is legally and equitably due as shown by the books of this concern. (9) No money shall be drawn from the paper for the first three months, except by mutual consent." Signed in duplicate August 29, 1902. That complainant has kept the condition of said articles of agreement and partnership so far as he is concerned, but said



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Brooke has failed to keep his part of said agreement, in that he has incumbered the plant of said Crenshaw County Critic with two mortgages. (The amounts of both and to whom given are here set out.) That neither of said mortgages have been paid, and the said Brooke used the proceeds of said mortgages for his own personal benefit, and not for the maintenance or support of said Crenshaw County Critic. That complainant had no knowledge of either of said mortgages until long after execution. And in this: That the said Brooke collected a large amount of money, to-wit, \$889, which was due said paper from subscribers and other debtors of said paper, and which he has not applied to the payment of the debts of said partnership, but which he has applied to his own private use. It is averred that the profits from the paper from the date of the articles of agreement until January 1, 1905, were sufficient to pay the entire indebtedness of the business, but complainant was kept in ignorance of the real condition of the business on account of the large collections made by Brooke and which were not reported to complainant, although he was bookkeeper of said concern. It is averred that the debts of the paper are \$900, that the property is worth \$2,500, and the partnership owes complainant more than \$900. It is averred that complainant has often requested Brooke to carry out the articles of agreement, and he has failed and refused to do so; that Brooke is insolvent, and has made more than one attempt to sell the paper, and is now attempting to sell it contrary to the wishes of complainant. It is also averred that it is necessary to keep the paper a going concern, and to let an issue or two elapse would greatly diminish the value of the property. Upon the filing of this bill, complainant filed his petition, supported by affidavit, praying for the appointment of a receiver, setting up the facts alleged in the bill, and going particularly into the conditions of the partnership, stating the solvent credits, the value of the plant, the debts due from solvent credits, the amount drawn by each partner, the proper division, and the amounts due each. Motions were made to dismiss the bill by the various parties thereto. Demurrers were interposed to the bill, raising the questions as to

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whether or not the partnership existed under the terms of the contract set up. Brooke filed an answer denying the allegations of the bill and filed affidavits opposing the appointment of a receiver. The register appointed a receiver to take charge of the business, and from this appointment appeal was taken to the chancellor, who confirmed the appointment made by the register and overruled the demurrers and the motion to dismiss. From this decree this appeal is taken.

M. W. RUSHTON, for appellant.—Under the contract set up no partnership was formed and none was to be formed. Tucker did not become liable for the debts against the outfit nor did he become liable for any losses.—*Gulf City Shingle Co. v. Boyles*, 129 Ala. 192; *Houze v. Patterson*, 53 Ala. 205. A person may be interested in or receive a part of the profits of the business without becoming a partner.—*Nelms v. McGraw*, 93 Ala. 245. The relations between these two parties was nothing more than that of tenants in common.—*Taylor v. Bush*, 75 Ala. 132. The court erred in not dismissing the bill for want of equity.—*Hunt, et al. v. Matthews*, 132 Ala. 286; *Sabel & Sons v. Savannah R. & E. Co.*, 135 Ala. 380. The court erred in not discharging the receiver.—*Alabama Co. v. Shackelford*, 137 Ala. 224.

PEARSON & RICHARDSON, for appellee.—The contract constituted the parties partners.—1 Bates on Partnership, p. 1; *White v. Coles*, 7 Ala. 569. The appointment of a receiver was proper.—*Martin v. VanSchaick*, 4 Page 478; *Baird v. Bingham*, 54 Ala. 463. The bill was properly filed for the dissolution of the partnership.—*Harris v. Harris*, 132 Ala. 208; *Lee v. Wimberly*, 102 Ala. 539; *Moore v. Price*, 116 Ala. 247; *Law v. Ford*, 2 Paige 310; 37 Ala. 201; Storey on Partnership, section 288; 2 Bates on Partnership, section 998.

DENSON, J.—Whether complainant and Brooke are partners inter sese must be determined by their intention, as the same is expressed in or may be gathered from the written agreement entered into by them, a copy

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of which is made a part of the bill.—*Pollard v. Stanton*, 7 Ala. 761; *Couch v. Woodruff*, 63 Ala. 466; *Bestor v. Barker*, 106 Ala. 240-250, 17 South. 389; 24 Am. & Eng. Ency. Law, 26. By the contract it is made to appear that complainant and Brooke associated themselves together for the publication of a newspaper. It also appears that at the time the contract was made Brooke was sole owner of the newspaper plant, and it may be conceded that by the terms of the contract he was to remain the owner or possessor of the legal title, and in control, until the formation of the contemplated corporation provided for by the contract; yet this of itself would not prevent the contract from being one of partnership. To constitute a partnership it is not necessary that there should be property forming its capital jointly owned by the partners. The property employed in the partnership business may be separate property of the partners; but if they share in the profits and losses arising from its use, a partnership exists.—*McCrary v. Slaughter*, 58 Ala. 230, 234. According to the contract, complainant "put into the business one hundred dollars, to be applied" to the payment of certain indebtedness mentioned in the contract. The contract stipulates that complainant and respondent shall work together faithfully and diligently for the good of the paper (*Critic*). By these stipulations it appears that the complainant contributed, not only money to the capital of the enterprise, but his skill and industry besides. The contract provides that the profits of the enterprise are to be divided one-third to complainant, one-third to Brooke, and one-third shall be applied to the liquidation of certain debts incurred by Brooke for the paper and some personal notes held against Brooke by "divers" persons, amounting in all to \$600. While nothing is said specifically about the losses, or that complainant is to share in them, yet, construing all the terms of the contract together, it is our opinion that there is created a community of profits and loss, or, as it is expressed in one of our cases, a communion of profit and loss is created. When this is the case, it is the settled rule of law that a partnership *inter sese* exists.—*Scott v. Campbell*, 30 Ala. 728; *Smith's Ex'r v. Garth*, 32 Ala. 368; *Chisholm v. Cowles*, 42 Ala. 179;

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*Couch v. Woodruff*, 63 Ala. 466; *McCrary v. Slaughter*, 58 Ala. 230; *Autry v. Frieze*, 59 Ala. 587; *Pulliam v. Schimpf*, 100 Ala. 362, 14 South. 488; *Lee v. Ryan*, 104 Ala. 125, 16 South. 2; 24 Am. & Eng. Ency. Law, p. 26.

It is insisted, however, that the contract only shows that the formation of a corporation at some future day was contemplated by the parties. It is true the contract provides for the formation of a corporation after the debts of the business shall have been paid; but to say that the contract does not, or that it was not the intention of the parties that it should fix their relations—their status towards each other—during their association together before the time for forming the corporation arrived, would be placing too narrow a construction on its terms. We cannot conclude that it was the intention of the parties that while working together in the business to acquire money with which to pay off the debts, their status should be undefined. Our conclusion is that the parties to the contract are partners *inter sese*.

The remaining question is, do the bill and affidavits support the appointment of the receiver? As is said in *Bard v. Bingham*, 54 Ala. 463-466: "The authorities affirm as a general rule that where a bill is filed seeking a dissolution of a partnership, and it satisfactorily appears that the complainant will be entitled to a decree for dissolution, a receiver will be appointed of course; the reason being that the same causes which would justify a decree for dissolution generally justify the appointment of a receiver."—*Gillett v. Higgins*, 142 Ala. 444, 38 South. 664; High on Receivers (3d Ed.) § 472. The bill avers, and we think it is supported by the proof, that Brooke is insolvent. It also avers that Brooke has collected large sums of money due the partnership, which he has appropriated to his own use, and without making any entry of them on the books of the partnership, and without acquainting complainant with the facts. This, if true, and it seems to be supported by the proof taken, constituted a breach of trust on the part of Brooke, and, taken in connection with the insolvency of Brooke, would warrant a decree for dissolution, and, therefore, the appointment of a receiver

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should follow.—*Gillett v. Higgins, supra*, and authorities there cited.

But it is insisted that the legal title to the plant is in Brooke; that he is in possession, and for these reasons a receiver should not be appointed. Granting that the contract provides that he is the editor and proprietor, and that he is to remain in control until the corporation is formed, yet the complainant paid into the business \$100, and if the respondent without complainant's consent converted to his own use profits in which complainant has an interest, and which should have been applied to the payment of the debts, it cannot be doubted that complainant under the contract has an equitable interest in the plant, and none but a court of equity can adjust such an equity; and, this being true, the fact that respondent has the legal title of itself presents no obstacle to the appointment of a receiver.—Beach on Receivers, § 619.

The respondent appeared at the hearing, and submitted demurrers to the application for a receiver and objections to the application being heard. He also submitted affidavits against the granting of the application. From the register's appointment of the receiver he appealed to the chancellor, and on the hearing before the chancellor he lodged with the chancellor his answer to the bill as a part of his proofs against the application for a receiver. So the insistence that the receiver was prematurely appointed, because appointed by the register before answer to the bill was filed, if tenable in the outset, lost its efficacy by the filing of the answer and lodging it with the chancellor, to be considered along with the affidavits submitted to him.—*Weis v. Goetter*, 72 Ala. 259.

We have found no error in the record, and the decree of the chancellor overruling the motion to dismiss the bill for want of equity and appointing the receiver are affirmed.

Affirmed.

TYSON, C. J., and HARALSON and SIMPSON, JJ., concur.

[Kinney v. Steiner Bros.]

**Kinney v. Steiner Bros.***Bill to Quiet Title.*

(Decided Feb. 5th, 1907. 43 So. Rep. 25.)

1. *Quieting Title; Pleas.*—Where the bill is filed under Section 809, Code 1896, the answer should state the requirements provided by Section 811, and pleas are not permissible.
2. *Same.*—Where the bill alleges the specific facts required by Section 809, it is unnecessary to traverse such facts, even if permissible, a point not decided.

APPEAL from Jefferson Chancery Court.

Heard before Hon. A. H. BENNERS.

Steiner Bros. filed their bill against appellant, seeking to quiet title to certain lands described therein. After answer, defendant filed certain pleas, as follows: “(1) At the time of the institution of this suit the complainants were not in peaceable possession of the property described in the complaint. (2) At the time this suit was instituted complainant was not in the open, notorious and peaceable possession of the lots described in the bill. (3) At the time of the institution of this suit this respondent was in the actual possession of lots 1 to 10, both inclusive, and 13 to 24, both inclusive, in block 20, according to the map and plat of the property of the Birmingham Ensley Land & Improvement Company, in Jefferson county, Ala., and claimed to own the same. (4) The lots described in the first paragraph of the bill were sold under and by virtue of valid tax sales had on the 3d day of June, 1891, under and by virtue of which tax deeds were executed on the 12th day of January, 1894, and were recorded in the office of the probate judge of Jefferson county, Ala., in the month of March, 1894, and respondent now owns and holds all the rights and title and interest and claim in and to the property conveyed by said tax deed, and he and those through whom he claims have paid the taxes on said property since the purchase at said tax sale, and claim

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to own the same since the date of said sale, and this respondent has erected around a part of said lot a part of a fence, before the institution of this suit"—and other pleas of similar import to seventh. The chancellor held the pleas insufficient, and from his decree this appeal is taken.

STALLINGS, NESMITH & DRENNEN, for appellant.—The court erred in decreeing the defendant's pleas insufficient.—*Foy, et al. v. Barr*, 39 South. 578. The court erred in overruling plea 1.—Section 809, Code 1896; *Foyet v. Barr, supra*; *Ladd v. Powell*, 39 South. 46; 128 Ala. 579; 115 Ala. 582. On the same authorities the court erred in overruling pleas 2, 4 and 7.

A. LATADY, for appellee. No brief came to the Reporter.

McCLELLAN, J.—Appeal from decree overruling pleas. The bill is filed under Code 1896, § 809 et seq., to quiet title. In all cases, it is indispensable to the maintenance of such a bill that it be averred, and sustained in the proof, that the complainant is in peaceable possession of the subject of the complaint. The title of the complainant is not the prime consideration, but his peaceable possession at the time his bill is filed makes such a prima facie case as will bring into exercise the jurisdiction of the court to the end that the defendant's claim or right may be determined and declared.—Code 1896, §§ 809-812; *Kendrick v. Colyar*, 143 Ala. 597, 42 South. 110. Section 811 of the Code prescribes what shall appear by the answer, if defendant claim the estate, or any interest in it, and requires specific avowal of the extent, character, and source of his claim. There is no room, under the statute, for a plea. The statute must be pursued. Dan Ch. Pr. pp. 702, 703. Besides, it would be manifestly unnecessary, if permissible, to permit, as some of the pleas do, a mere traverse of facts

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upon which the survival of the bill depends. The decree is affirmed.

Affirmed.

TYSON, C. J., and DOWDELL and ANDERSON, JJ., concur.

### **Goodson v. Stewart, et al.**

#### *Bill to Quiet Title to Timber Growing on Land.*

(Decided Jan. 23rd, 1907. 42 So. Rep. 1019.)

*Injunction; Pendente Lite; Dissolution.*—An injunction restraining the cutting and removal of timber pending a suit to quiet title to the timber, should not be dissolved on the coming in of an answer which merely asserts a fee simple title to the pine timber and makes no denial as to the other timber.

APPEAL from Autauga Chancery Court.

Heard before Hon. W. W. WHITESIDE.

Suit by Thomas R. Goodson against Irenus Stewart and others. From a decree dismissing an injunction, complainant appeals.

GUNTER & GUNTER, and C. E. O. TIMMERMAN, for appellant.—The only question presented on this appeal is whether or not the appellant is entitled to have the thing in dispute protected by injunction until the title can be decided. This seems to be settled in favor of appellant.—*Coleman & Davis v. Elliott*, 40 So. 666; v High on Injunctions, Sec. 671 et seq; *Decgan v. Neville*, 127 Ala. 497; *Jerome v. Ross*, 11 Am. Dec. 500.

H. E. GIPSON, for appellee. No brief came to the Reporter.

TYSON, J.—The bill in this cause was filed to quiet the title to the timber now growing upon certain de-



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scribed lands, which are owned by the complainant, and for an injunction against defendants, pendente lite, restraining them from trespassing upon the lands and cutting and removing therefrom valuable pine and other timber. The answer does not deny the title of complainant to the lands, neither does it deny the entry upon it and the cutting and removal therefrom of the timber as alleged in the bill, but simply asserts a fee simple title to the pine timber under mesne conveyances from one Price, who, it is alleged, owned the land and sold the pine timber in the year 1855, with the right of ingress and egress on and over said land for the cutting, hauling, and removing it. On motion the chancellor dissolved the preliminary injunction, presumably upon the denials in the answer. It will be observed that the answer makes no denial of the cutting and removal of timber, other than pine, as charged in the bill. The averment of the bill must, therefore, be taken as confessed. This being true, the injunction should not have been dissolved, if the bill contains equity, which it confessedly does.

But, considering the case, as the chancellor did, upon the affidavits and on abstract of respondents' title to the pine timber, submitted along with the motion, without committing ourselves to the correctness of this procedure, we are constrained to reach the same conclusion. Price's deed only conveyed the pine timber on the land at the date of its execution (1855) large enough to be sawn into lumber. The preponderance of the evidence, as shown by the affidavits, establishes that all such timber was cut and removed from said lands many years ago, and that the pine timber now on it has grown up since. We do not wish to be understood by what we have said as intimating that, if the pine timber now on the land was on it in 1855, respondents would have the legal right of ingress and egress on and over the land for the purpose of cutting it. This question is not presented. The decree dismissing the injunction is reversed, and one will be here rendered reinstating it.

Reversed and rendered.

HARALSON, SIMPSON, and DENSON, JJ., concur.

[Cobia, et al. v. Ellis.]

**Cobia, et al. v. Ellis.*****Bill to Abate Recurring Injury Caused by Erection of a Dam.***

(Decided Dec. 18th, 1906. 42 So. Rep. 751.)

1. *Injunction; Jurisdiction; Equity; Trespass.*—Where a single action at law will not furnish an adequate remedy, and a multiplicity of suits can be avoided by proceedings in chancery, equity has jurisdiction concurrent with courts of law to protect a land owner against constant and frequently recurring injuries from wrongful diversion of water, and will enjoin a wrong-doer without regard to his ability to respond in damages.
2. *Same; Retention of Jurisdiction to Award Damages.*—Where equity has assumed jurisdiction of an action for injunction to restrain the wrongful overflowing of plaintiff's land, the court will ascertain and award damages to the injured party in order to settle the whole controversy.
3. *Same; Laches; Statute of Limitations.*—Complainant is not barred by mere laches short of the period prescribed by the statute of limitations, where he is otherwise entitled to an injunction to prevent the overflowing of his land, caused by an increase in the height of a dam constructed by defendant.
4. *Water and Water Courses; Dam; Construction; Prescriptive Rights.*—A mill owner, who has maintained a dam at the height of four feet for several years, does not thereby acquire a prescriptive right entitling him to raise the height to seven feet; nor does the bar of the statute apply to the increased height, unless the increase has existed for more than ten years.

APPEAL from Cherokee Chancery Court.

Heard before Hon. W. W. WHITESIDE.

The facts made by the bill are that the complainant, Ellis, owned land just above lands owned by respondent Cobia on the Chattooga river, in Cherokee county; that Cobia operated a sawmill for some years by means of a dam across the river of four feet head; that some years later, and within three or four years of the filing of the bill, the height of the dam has been increased to seven feet, causing the river at time of high water to overflow lands belonging to Ellis, and that this is constantly re-

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curing at such periods of high water; that the roadway, which is a public road, is inundated, and access to and from the land cut off.

Motion was made to dismiss for want of equity, and demurrers interposed: (1) For that the bill does not set out such a state of facts as entitles complainant to relief. (2) For the said bill shows on its face that complainant has a full and adequate remedy at law. (3) For that the averments of damage are too vague, indefinite, and uncertain. (4) For that it does not appear that the injury complained of is irreparable or irremediable. (5) For that it does not appear from said bill how much of plaintiff's land is injured, nor to what extent. (6) For that it does not appear from said bill when said injury occurred, nor whether it is of a permanent or continuing nature, nor that it will occur again in the future. For that it does not appear in said bill that any material injury has occurred or will occur to said land. For that it appears that the complainant has been guilty of such laches in applying to this honorable court as will bar him from any relief herein.

From a judgment overruling the demurrers and denying the motion to dismiss for want of equity, this appeal is taken.

MATTHEWS & MATTHEWS, for appellant.—The bill should have been dismissed on account of the unexplained laches of the complainant.—10 A. & E. Ency. of Law, 802; 12 Ib. 562; *Smith v. Clay*, Ambl. 645; *Western Union v. Judkins*, 75 Ala. 428; *Clifton Iron Co. v. Dye*, 87 Ala. 468; *Parker v. Lake Cotton etc., Co.*, 2 Black, 545; *Sheldon v. Rockwell*, 76 Am. Dec. 265; *City of Logansport v. Uhl*, 50 Am. Rep.; *Orme v. Fridenberg*, 24 Am. St. Rep. 567; *Reid v. Gifford*, 6 John's Chancery, 19; *Tichenor v. Wilson*, 8 N. J. Eq. 197. On the same authority the court erred in overruling demurrers numbered 10, 15, 17 and 19. The court erred in overruling demurrers 16, 18, 20 and 21.—1 A. & E. Ency. of Law, 74; *Parker v. Lake Cotton Co. supra*; *Ray v. Lynes*, 10 Ala. 63; *St. James Church v. Arrington*, 86 Ala. 546; *Kingsberry v. Flowers*, 65 Ala. 479; *Ogletree v. Mc-*

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*Quaggs*, 67 Ala. 580; *Rouse v. Martin*, 75 Ala. 510; *Goodall v. Crofton*, 31 Am. Rep. 535. The court erred in overruling demurrers 13 and 14.—*Whaley v. Wilson*, 112 Ala. 627. The court erred in overruling demurrers 1, 2, 3, 4, 5, 6, 7 and 9.—*Rouse v. Martin*, *supra*; *Rosser v. Randolph*, 7 Port. 238; *Jerome v. Ross*, 11 Am. Dec. 484 and note.

“*Vigilantibus, sed non dormientibus, acquitas subvenit.*”

BURNETT, HOOD & MURPHREE, for appellee.—Where injuries are constantly recurring, and to avoid a multiplicity of suits equity will intervene without regard to the ability to answer in damages and without waiting for a trial at law.—*Roberts v. West*, 126 Ala. 359 and authorities cited; *Furriss v. Douglass*, 78 Ala. 124; *Ninninger v. Norwood*, 72 Ala. 277; *Hundley v. Harrison*, 123 Ala. 299. The fact that the dam had been maintained at a height of four feet for several years does not give either prescriptive right to raise it nor put in operation the bar of the statute against the raise.—*Wright v. Moore*, 38 Ala. 597; *Ogletree v. McQuagg*, 67 Ala. 580; *Whitfield v. Rogers*, 26 Miss. 84. Mere delay short of the bar of the statute will not preclude the enforcement of this equitable right.—*Burden v. Stein*, 27 Ala. 112; *Muller v. Freen*, 36 Minn. 275; *Carlisle v. Cooper*, 18 N. J. Eq. 246; *Chatting v. Troy Co.*, 34 N. Y. 492; *Smith v. Thompson*, 54 Am. Dec. 132. The bill was sufficient. *Ninninger v. Norwood*, *supra*; *Roberts v. West*, *supra*.

HARALSON, J.—The bill in this case was filed to abate a nuisance, alleged to have been caused by an increase in the height of a dam erected by the defendant across the Chattooga river, resulting, “at high tide,” in an overflow of the lands of complainant, and of the public road between them; and for damages caused by said overflow.

The defendant demurred to the bill, and moved to dismiss it for want of equity, and from a decree overruling the demurrers and motion to dismiss, this appeal is taken.

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The bill avers "that at high tide of said river said waters are thrown back over the lands of orator much higher than they were before said dam was raised, and have been caused to overflow other lands not overflowed before the raising of the dam."

To protect a landowner against constant or frequently recurring injuries from the wrongful diversion of water, equity has jurisdiction concurrent with courts of law, and will enjoin the wrongdoer without regard to his ability to respond in damages, since a single action at law will not furnish an adequate remedy, and a multiplicity of suits can be avoided by proceedings in chancery.—*Roberts v. Vest*, 126 Ala. 355, 28 South. 412; *Farris v. Dudley*, 78 Ala. 124, 56 Am. Rep. 24; *Nininger v. Norwood*, 72 Ala. 277, 47 Am. Rep. 412.

When, for such purpose, jurisdiction has been assumed by equity, "the court, to settle the whole controversy, will ascertain and award damages to the injured party." Authorities, *supra*. And, if the right of complainant is clear, it is not essential that it should be first established by verdict and judgment at law.

The injury complained of in the bill is constantly recurring at each high tide of the river; a single action of law would not, therefore, furnish an adequate remedy, and the right to preventive relief in a court of equity, upon such facts, is clear.

It is contended, however, that the right of complainant is barred by laches to such relief, the bill averring that the dam had been raised three or four years before the filing of the bill. When the right of complainant is clear, and the injury is of a character which would entitle him to call upon a court of equity to interfere, without first resorting to law, he is not deprived of his remedy by mere laches short of the period prescribed by the statute of limitations.—*Burden v. Stein*, 27 Ala. 112, 116, 117, 68 Am. Dec. 758. In the case of *Western Union Tel. Co. v. Judkins*, 75 Ala. 428, the right to preventive relief, because of the character of the injury, did not exist. it being held that the entry and possession by the telegraph company, however long it might exist, furnished but one grievance, a single cause of action capable of full redress by legal remedy, and laches

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was applied to the aspect of the bill involving the right to prevent the taking of property by a corporation in the exercise of eminent domain, without compensation being first made, which right, as there stated, existed only when the complainant "applies seasonably." It does not appear in this case that the mill is to be operated for the benefit of the public or that it is stamped with the characteristics of a public utility.

While the right to injunction is not barred by laches short of the period prescribed by the statute of limitations, where the right of complainant is clear, and the injury is of such a character as would entitle the complainant to call upon a court of equity to interfere, without first resorting to law, it may be lost if complainant has, by this conduct, induced the other party to alter his situation under such circumstances as would render it inequitable for him to complain.—*Burden v. Stein, supra*; *Clifton Iron Co. v. Dye*, 87 Ala. 468, 471, 6 South. 192. Such defense, however, does not appear from the averments of the bill.

The fact that the dam had been maintained at the height of four feet for several years does not give the right to raise it to the height of seven feet. That does not give prescriptive right nor does the bar of the statute of limitations apply as against the increased height, unless the increase has existed for more than ten years. *Wright v. Moore*, 38 Ala. 593, 82 Am. Dec. 731.

Affirmed.

TYSON, C. J., and DOWDELL and SIMPSON, JJ., concur.

## Brunson et al. v. Rosenheim & Son.

*Bill to Set Aside Conveyance for Alleged Fraud.*

(Decided Feb. 5th, 1907. 43 So. Rep. 31.)

1. *Equity; Fraudulent Conveyances; Pleadings; Answers; Pleas.*—The answer set up as a defense to the bill that the debtor had

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been discharged in bankruptcy, and the paragraph alleging such discharge concluded with a statement that defendants attached and made a part of the answer the decree of discharge as a plea in bar. Held, such paragraph was not a plea in form incorporated in the answer entitling defendants to a decree on the issue joined on the plea, in the absence of setting down the plea to be tested as to its sufficiency before a final submission of the cause.

2. *Bankruptcy; Pleading Discharged; Avoidance.*—A plea setting up a discharge in bankruptcy as a bar is properly met by an amendment alleging that the lien under the judgment sought to be enforced was acquired more than four months before the filing of the bankruptcy petition.
3. *Equity; Pleading; Pleas; Sufficiency.*—While the rule is that when a plea is filed to a bill and its sufficiency in law is not tested, but issue is taken thereon, and the plea is sustained by the evidence, the defendant is entitled to a decree, although the matter alleged in the plea is immaterial, yet, when the complainant takes issue on the plea, or matter in avoidance is set up by amendment and such matter is proven the defendant will not be entitled to a decree.
4. *Same.*—Section 701, Code 1896, does not prevent the filing of matters in confession and avoidance to a plea as an answer to a bill in chancery.
5. *Fraudulent Conveyance; Prima Facie Case; Burden of Proof.*—Proof of the existence of complainant's debt before and at the time of the alleged conveyance, that complainant recovered judgment, and that execution had been returned no property found, together with the insolvency of the debtor, establishes a prima facie case and places the burden of proof on the defendant to show that the conveyance was not fraudulent, but for a consideration not less than the fair value of the property.
6. *Same; Homestead.*—The conveyance of the homestead by a debtor is not subject to attack by his creditors as such homestead is exempt from execution.
7. *Same; Constructive Notice.*—If the grantee in a fraudulent conveyance has knowledge of facts sufficient to put him on inquiry, which if followed out would have led to knowledge of the fraudulent intent, it was not material that he did not have actual knowledge of such intent.

APPEAL from Coffee Chancery Court.

Heard before Hon. W. L. PARKS.

Bill by Joseph Rosenheim & Son against W. J. Brunson and others to set aside certain alleged conveyances

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and to enforce a judgment lien on property conveyed. From a judgment in favor of plaintiff, defendants appeal.

W. O. MULKEY, for appellant.—The burden is on complainants to show that Brunson is insolvent; that complainants are his creditors and that he executed the conveyance to defraud his creditors while insolvent.—*Moog v. Farley*, 79 Ala. 236. Applying this test the bill cannot be maintained as to the M'Hurleys.—3 Mayf. 875. The lot was exempt to Brunson and the fact that there were two dwellings on the lot did not operate to deprive Brunson of the right to claim the lot.—Section 2, article 10, Constitution 1875; *Winston v. Hodges*, 102 Ala. 304. Under the allegations of the bill the proof must show that both grantees participated in the fraud or there is a variance.—*Elyton Land Co. v. Battling Iron Works*, 109 Ala. 600; *Mortgage Co. v. Sewell*, 92 Ala. 170. Complainant's amendment in the nature of a replication should have been stricken.—*Mylan v. King*, 35 So. Rep. 998. There was proof to sustain respondent's plea without conflict and he was entitled to a decree.—*Stein v. McGrath*, 128 Ala. 122.

J. F. SANDERS, for appellee.—The averments of the bill present a case for relief in equity.—*Williams v. Spraggins-Buck & Co.*, 102 Ala. 424; *McLaren v. Anderson*, 104 Ala. 201; *Seales v. Robinson*, 75 Ala. 363. The respondents gain nothing by the decree of the United States Court discharging Brunson from his debts.—*Mylan v. King*, 35 South. 998; *Stein v. McGrath*, 128 Ala. 182; *Chadwick v. Carson*, 78 Ala. 116. The complainant's lien was never lost.—*Matthews v. Insurance Company*, 75 Ala. 89; *Reynolds v. Collier*, 103 Ala. 245; *Street v. Duncan*, 117 Ala. 573. The answer should show the actual payment of an adequate consideration and how, when and in what the consideration was paid. *Gamble v. Altman*, 28 South. 30. The demurrers to the original bill were properly overruled.—*Kauffman v. Richardson*, 37 South. 673; *O'Neal v. Brewing Co.*, 101 Ala. 383; *Metcalf v. Arnold*, 32 South. 763; *Wood v. Potts*, 37 South. 253.



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DOWDELL, J.—The bill in this case is one by a judgment creditor against the debtor and his vendees, seeking to set aside certain alleged fraudulent conveyances by the debtor and for the enforcement of a lien under the judgment and execution against the property sought to be conveyed. The bill is sufficient in its averment of the facts constituting the alleged fraud. The bill also avers a return of the execution on the judgment “No property found” and the insolvency of the respondent debtor. A joint answer to the bill was filed by the respondents, in which there was a general denial of the allegations of fraud. The answer further set up, as a defense to the bill, the discharge in bankruptcy of the respondent debtor. This defense is distinctly set up by way of answer, although, at the conclusion of the paragraph in the answer to the bill setting up this defense, it is stated: “And the respondents attach and make a part of the answer said decree (meaning decree in discharge in bankruptcy), properly certified by J. W. Dimmick as clerk of the court, and offer same as a plea in bar to the further maintenance of this suit.” After the filing of the answer, the complainants amended their bill by averring the facts of the petition and discharge in bankruptcy of the respondent debtor, Brunson, and by further averring that the lien, under the judgment sought to be enforced, was acquired more than four months before the filing of the petition in bankruptcy.

If it should be conceded, as contended in argument by counsel for appellants, that the matter of the discharge in bankruptcy set up as a defense in the answer was in form and substance a plea, the sufficiency of which should have been tested before proceeding to final submission, to avoid committing the complainants taking issue on the plea without having so tested its sufficiency, still there is no merit in appellants’ contention that they were entitled to a decree on issue joined on the plea. While the discharge in bankruptcy was proper subject-matter of a separate and independent plea as a defense to the bill, and might have been so pleaded, yet we are of opinion that the manner in which this defense was set up did not constitute it a plea in form, and as such incorporated in the answer, and hence falls within

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the influence of the principle stated in *Mylin v. King*, 139 Ala. 319, 35 South. 998, and *Stein v. McGrath*, 128 Ala. 182, 30 South. 792.

But if, as above stated, it should be conceded that the matter of the discharge in bankruptcy, as pleaded, was in form and substance a separate and distinct plea to the bill, it was properly met by the subsequent amendment of the bill.—*American Freehold Land Mortgage Co. v. Dykes*, 111 Ala. 178, 18 South. 292, 56 Am. St. Rep. 38; *Smith v. Vaughan*, 78 Ala. 201; *Lanier v. Hill*, 30 Ala. 111; Story's Equity Pleadings, § 878. When a plea is filed to a bill in equity, the same may be set down for hearing on its sufficiency; that is, its sufficiency in law as a defense to the bill. If this is not done, and issue is taken on the plea, and the plea is sustained by the evidence, the respondent is entitled to a decree, although the matter set up in the plea is immaterial.—*Tyson v. Decatur Land Co.*, 121 Ala. 414, 26 South. 507. But if the plea is sufficient as a defense in the matter set up in it—and it makes no difference whether the sufficiency of the plea is admitted or so determined in a hearing on its sufficiency—the complainant may then either take issue on the plea or set up matter in avoidance, which latter course is accomplished by an appropriate amendment of the bill.—*Land Mortgage Co. v. Dykes*, *supra*, and other cases cited above. If the rule were otherwise, and as contended for by counsel for appellant, that is to say, that a complainant in a bill in equity, on a plea filed to the bill, the sufficiency of which is either conceded or so determined by the court on a hearing for that purpose, is shut up to taking issue on the plea, in many cases an utter failure of justice would result. No such rule can be logically deduced from the statute (section 701 of the Code of 1896), which provides simply as follows: "No replication is necessary to an answer."

Proof of the existence of complainant's debt before and at the time of the alleged conveyances and the complainant's judgment, and the issue of execution thereon with the return of "No property found," and the insolvency of the respondent debtor, was without conflict. The facts being shown, the bill, among other allegations

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as to the mala fides of the transaction assailed, charging that the consideration of the conveyances was fictitious and simulated, the burden of proof was upon the respondent's vendees to show that the sales to them by the respondent Brunson were fair and made in good faith, and also upon them to show that the consideration was a valuable one and the price paid for the lands was not less than their fair value. "In other words, the burden was upon them to overcome the presumption of unfairness and mala fides in the transaction."—*Gamble v. Aultman & Co.*, 125 Ala. 372, 28 South. 30; *Wood v. Riley*, 121 Ala. 100, 25 South. 723; *Halsey v. Connell*, 111 Ala. 221, 20 South. 445; *Freeman v. Stewart*, 119 Ala. 623, 24 South. 31; *Brown Co. v. Henderson*, 123 Ala. 623, 26 South. 199. In *Gamble v. Aultman & Co.*, *supra*, it was said: "In order to lift this burden, however, affirmative averment of the facts relied on as constituting the consideration is as essential as satisfactory proof of their existence. The respondents, in order to be accorded the advantage of evidence offered in support of the bona fides of the transaction, should have alleged in their answers the facts showing good faith, the actual payment of an adequate consideration, and how, when, and in what the consideration was paid."

As stated above, the respondents here filed a joint answer, which, in its denials and averments, is similar to the answer filed in the case of *Gamble v. Aultman & Co.*, *supra*. As to the respondent McHurley, the answer contains nothing but a general denial of the allegations of the bill, and contains no averment as to the amount of the consideration paid by them to Brunson for the land conveyed to them, how or when paid, or whether the same was in cash. Under the principle laid down above, for lack of these affirmative averments of the bona fides of the transaction, assailed by complainants' bill, and on the evidence offered by the complainants on the submission of the cause on final hearing, the chancellor committed no error in his decree in favor of the complainants against this respondent.

As to the respondent Thompson, the pleadings, as well as the evidence, show that the two lots embraced in the conveyance made by Brunson to him were separate and

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distinct lots. The half-acre lot which constituted the residence and homestead of the respondent debtor, Brunson and which was contained in the conveyance to the respondent Thompson, was shown to be of less value than \$2,000. As to this the chancellor properly decreed in favor of the respondent Thompson. The same being the homestead of Brunson, and under the laws of the State exempt from levy and execution, no fraud could be committed against a creditor in the conveyance of it by the debtor. As to the storehouse lot described in the bill, and which was included in the conveyance from Brunson to Thompson, we are of the opinion that the evidence fully justified the chancellor in finding that the conveyance was fraudulent and void as to this property as against the complainants. If the respondent Thompson did not have actual knowledge of the fraudulent intent on the part of the respondent Brunson in the sale and conveyance of said property, there is abundant evidence reasonably to show that Thompson did have knowledge of facts sufficient to put him upon inquiry which, when prosecuted, would have led to knowledge of the main fact.

We concur with the conclusion of the chancellor, and his decree will be affirmed.

**Affirmed.**

TYSON, C. J., and ANDERSON and MCCLELLAN, JJ.,  
concur.

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**City Council of Montgomery. et al.  
v. Barnett, et al.**

*Bill to Declare Void a Paving Contract, and to Restrain  
Paying Same*

(Decided Feb. 12th, 1907. 43 So. Rep. 92.)

1. *Municipal Corporations; Contract for Improvement; Special Assessment; Validity.*—The city charter required the treasurer to advertise for sealed bids for street improvement work, and that the contract be let to the lowest responsible bidder. An ordinance directed the officer to advertise for bids for street improvement according to plans and specifications on file in the city engineer's office, which plans and specifications required a two year's maintenance of the work. The advertisement published stated that only bids for ten years maintenance would be received. Held, under such published advertisement the city had no authority to close a contract for a two year's maintenance.
2. *Same.—Local Acts 1900-01, pp. 1027 and 1029,* authorizes the city to make street improvement and to levy assessments therefor, and to issue bonds for the purpose of improving the streets, the proceeds to be applied only to the paving or improvement designated by the ordinance. The ordinance passed provided for the paving of a certain street, the cost to be assessed against the abutting property to the amount that it had been benefited by the paving. Held, neither the act nor the ordinance authorized any contract for future maintenance, or the appropriation of any money raised from the sale of such bonds towards the payment of such a contract or any part of it, and such contract was void and proceedings thereunder would be enjoined at suit of tax payer.

APPEAL from the Montgomery City Court.

Heard before Hon. A. D. SAYRE.

Bill by G. W. Barnett, et al., as tax payers, against the city of Montgomery, et al., to declare a contract for paving void and to enjoin paying any money therein.

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C. P. MCINTYRE, and STEINER, CRUM & WEIL, for appellant.—It is a well established doctrine that the court will not interfere and set aside the contract for municipal improvement for the reasons alleged in this bill, in the absence of fraud or corruption.—20 A. & E. Ency. of Law, pp. 1165-66 and 67; 1 Smith on Municipal Corporations, section 746. The contention made by complainants here was made and considered adversely to them in the case of *Wilson v. Trenton*, 68 Am. St. Rep. 714.

MARTIN & MARTIN, for appellees.—The contract was different as awarded from the one advertised. This renders it invalid.—20 A. & E. Ency. of Law, 1169; *Inge v. Board of Public Works*, 135 Ala. 187. A contract by the city with the paving contractor for future repairs is ultra vires and void.—*Inge v. Board of Public Works*, supra; *Portland v. Bitumenous Paving Co.*, 72 Am. St. Rep. 713; *Brown v. Jenks*, 98 Cal. 10; *Alameda Co. v. Pringle*, 80 Am. St. Rep. 124; *Blochman v. Spreckle*, 67 Pac. 1061.

SIMPSON, J.—This bill was filed in the city court in equity of Montgomery by the appellees, as owners of property on Hull street and as taxpayers of the city of Montgomery, seeking to have declared null and void a certain contract of paving said street, to restrain the city council from paying out any money thereon, and from issuing certain bonds, and from fastening on the property of complainants any assessment or liability on account of said improvement. The act of the Legislature authorized the city council to pave, or otherwise improve said street (with others). The city charter requires: "It shall be the duty of the city treasurer to advertise for sealed bids for doing all such work as the council shall determine to let out on contract. The award of each contract shall be made to the lowest responsible bidder, who shall comply with such reasonable regulations as may be prescribed before the bids are called for." The city ordinance recited the fact that "the cost of the said paving is to be assessed against the property abutting on said street to the amount that such

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property has been benefitted by such paving or improving, not to exceed the increased value of said property, by reason of the special benefits derived from such improvement," and directed the city treasurer to advertise for bids for paving the streets "in accordance with the specifications in the office of the city engineer." The treasurer did so advertise, stating that "bids on asphalt and bitulithic pavement are requested both with a five and ten year guaranty"; and, all bids under that notice having been rejected, the bill alleges that the city council then ordered a new advertisement, and that "only bids for ten years' maintenance be received." Accordingly, the treasurer advertised for bids, stating "all bids to be of ten years' guaranteed maintenance." Said advertisement also stated in a previous part of it that the street was to be paved with either vitrified brick, etc., "all according to plans and specifications on file in the city engineer's office."

The paper which is referred to as "plans and specifications" described in detail the manner in which the paving is to be done; that bond shall be given and bids must be on the blank form, which follows, and which goes more minutely into details, and provides that the "party of the second part further agrees that for a period of two years from the date of the final estimate of the said work he will keep in good order and repair all the work done under this contract, except only such part or parts of the work as may have been disturbed after the final estimate of the same, glazing, sewers, etc., and that, whenever directed by said engineer," said party would proceed to repair. This is the contract which was signed. The complainants, both as taxpayers of the city and as persons whose property is liable to the assessment provided for, have the right to invoke the aid of a court of equity to restrain the execution of contracts and the fastening of obligations and liens upon the taxpayers of the city, if there be no authority of law therefor. The object in advertising for bids is to bring about competition, and thus get the best offer that can be obtained, so as to be able to select the lowest and best bidder, as the law directs. It is manifest, then, that in order to accomplish the purpose the advertisement and

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the bids must correspond. As said by this court in another case: "To require the bids upon one basis, and award the contract upon another, would in practical effect be an abandonment of all bids."—*Inge v. Board of Public Works*, 135 Ala. 187, 200, 33 South. 678, 682, 93 Am. St. Rep. 20.

Having advertised for bids with a ten-year maintenance, the city was not authorized to close a contract with a two-year maintenance. It would be impossible to tell whether or not that was the lowest bid that could have been obtained, if the bidders had known that a two-year maintenance would be accepted.—20 Am. & Eng. Ency. Law, p. 1169. The appellant claims that, inasmuch as the advertisement refers to the plans and specifications on file in the engineer's office, bidders could learn from that that only a two-year maintenance clause would be required. Even if the clause in the latter part of the proposed contract could be construed as a part of the "plans and specifications" referred to, the whole paper is referred to only as a form; and, when the advertisement specially stated that a ten-year maintenance clause would be insisted on, we cannot see how it could be understood otherwise than that, while the form of the contract would be adhered to, and the specifications as to the character of the material and work would be insisted on, yet that the maintenance clause should be for ten years, as stated in the notice, in place of two years, as stated in the form. Appellee also insists in his brief that the treasurer was not authorized to insert the ten-year maintenance clause in the advertisement; but it is so stated in the bill, and the submission and decree in this case was on the demurrer and motion to dismiss. Besides, when the accredited officer of the city published such a notice in the newspaper of the city, and the contract was made on bids which came in in response thereto, it must be presumed that the city acquiesced in the terms of the notice. At any rate, these were the terms on which bids were requested, and the only terms to which bidders could respond, and it may be that contractors who did not care to enter into a ten-year guaranty did not deem it necessary to examine the plans and specifications on file.



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The act under which the city was proceeding authorized it to "issue bonds for the purpose of paving or otherwise improving the streets," and provided that "the proceeds arising from the sale of such bonds shall be applied only to the paving or improving designated in the ordinance providing for their issue." Loc. Acts 1900-01, pp. 1027, 1029, §§ 1, 5. The city ordinance, being "An ordinance to pave South Hull street," etc., provided that said street should be paved, and recites that, "as the cost of the said paving is to be assessed against the property abutting on said street, to the amount that such property has been benefited by such paving, or improvement, not to exceed the increased value of said property by reason of the special benefits derived from such improvement," and notifies persons interested that unless they file written objections within 30 days "the city council will proceed to issue the bonds to pay for the said pavement, and make a contract for such paving." It will be observed that neither the act nor the ordinance authorize any contract to be made for future maintenance, or any appropriation of the money to be raised by the sale of the bonds to the payment of any such contract.

Well-considered cases hold that, where a city is authorized to contract for paving its streets, it has no authority to incorporate in the contract an agreement for future maintenance.—*Portland v. Bituminous Paving Co.*, 33 Or. 307, 52 Pac. 28, 44 L. R. A. 527, 72 Am. St. Rep. 713, in which case it is said that such a contract "was calculated to increase the amount of the bid, by the estimated cost of such repairs" (page 30 of 52 Pac. page 717 of 72 Am. St. Rep. [33 Or. 307, 44 L. R. A. 527]); also, "a burden was undeniably imposed upon the adjacent property beyond such as was authorized by the charter" (page 30 of 52 Pac., page 717 of 72 Am. St. Rep. [33 Or. 307, 44 L. R. A. 527]); also, "the expense undertaken is indefinite and the property owner must pay for them in advance. \* \* \* Then, it being contingent, he will be paying for repairs which may never be required" (page 31 of 52 Pac., page 717 of 72 Am. St. Rep. [33 Or. 307, 44 L. R. A. 527]); also, "there was an evident lack of statutory power for entering into a con-

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tract for keeping and maintaining the street and pavement in repair, and consequently a want of legal authority to use the public moneys for that purpose." Page 31 of 52 Pac., page 718 of 72 Am. St. Rep. (30 Or. 307, 44 L. R. A. 527). —*Alameda Macadamizing Co. v. Pringle*, 130 Cal. 226, 62 Pac. 394, 52 L. R. A. 264, 80 Am. St. Rep. 124, in which case *Brown v. Jenks*, 98 Cal. 12, 32 Pac. 701, is quoted to the effect that "officers are provided and vested with the power and charged with the duty of seeing that such work is properly done. A bond cannot be substituted for the performance of this duty." Page 395 of 62 Pac., page 126 of 80 Am. St. Rep. (130 Cal. 226, 52 L. R. A. 264).

The case of *Wilson v. Trenton*, 61 N. J. Law, 599, 40 Atl. 575, 44 L. R. A. 540, 68 Am. St. Rep. 714, cited by counsel for appellant, states that the contention that such a contract enhances the price nominally charged for laying a good pavement "ignores the principle on which assessments for municipal improvements are levied in this State." Property owners are not chargeable with the price of such improvements, but only with an equivalent for the special benefits they derive therefrom." And hence the court argues that, as the municipality must pay all over the fair cost of laying a good pavement, the plaintiff's complaint must be reserved until the assessment is made. But in the case now under consideration the contract is entire, so that it would be difficult, if not impossible, to tell what part of the price is for paving and what part for future maintenance. The ordinance treats the entire contract as the paving contract, and provides that the city council will proceed to issue the bonds to pay for the same. So far as the assessment is concerned, it may be true that, if the benefits should be found to be less than the actual cost, it would not increase the amount assessed, yet, if the benefits should be found to exceed the actual costs, it would affect the amount assessed, as the only limit then would be the actual cost, and, if that had been made more than it should have been, the property owner would have much more to pay than he was liable for. However, this bill is filed, not only in the capacity of abutting owners, but also as taxpayers, and under the authorities cited,

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which we think are supported by sound reason, it is a question of power, and the city has no power to make the contract and to use the money, the proceeds of the sale of the bonds, in the manner proposed by the ordinance. The taxpayer has the right to enjoin the same. 20 Am. & Eng. Ency. Law, p. 1231.

The decree of the court is affirmed.

TYSON, C. J., and HARALSON and DOWDELL, JJ., concur.

## Epperson & Co., v. Bluthenthal, et al.

*Bill to Restrain Unlawful Use of Trade Mark or Device and for Damages and an Accounting.*

[Decided Dec. 20th, 1906. 42 So. Rep. 863.]

1. *Trade Marks; Right to Protection.*—When one has adopted a trade mark to identify his product, and has, by his skill and labor, created a valuable market therefor and induced public confidence in the superior quality of his goods, he is entitled to protection, so long as he deals honestly with the public, against those who attempt to appropriate his trade mark, and use it on other goods of the same class, without right.
2. *Same; Suit to Restrain Infringement; Jurisdiction.*—The jurisdiction of equity to restrain infringement of a trade mark is based on the right of property in the complainant, and its fraudulent invasion by another. Its use is the prevention of fraud on him and the public, so the person invoking equity's aid must himself be free from fraud. A material misrepresentation as to the person manufacturing the article, or as to the material composing it, deprives such one of right of relief.
3. *Same.*—Where the evidence showed that the contents of the bottles, on which was used the trade mark adopted to identify the whiskey manufactured, bottled and sold by complainant, was greatly inferior to what was indicated by the labels and lettering, and that such labels and lettering was to induce the public to believe that the quality of the whiskey was greatly superior to what it really was, equity will leave the parties where it finds them.

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APPEAL from Montgomery City Court.

Heard before Hon. A. D. SAYRE.

Suit by Aaron Bluthenthal and another against J. W. Epperson & Co. From a decree for complainants, defendant appeals. Reversed, and bill dismissed.

The case made by the bill is: That orators are large manufacturers and jobbers of whiskies, brandies, etc., and sell their goods to the retail trade in Montgomery. That they manufacture, bottle, and sell, and have for four years past manufactured, bottled, and sold, a certain kind, grade, or quality of whiskey put up in a certain kind or style of bottles. The said bottles containing said whiskey have attached to the sides thereof a label or trade-mark with the following words thereon: "Old Joe, V. O. S. Rye Whiskey, Bluthenthal & Bickart, Sole B. & B. Proprietors, Atlanta and Cincinnati"—and a likeness of a human head and bust on said label. Said bottles also had and have a small corkscrew attached to the neck of said bottle, and over the cork therein a label, which label contains the words: "Not genuine, unless this seal is unbroken. Bluthenthal & Bickart, B. & B. Proprietors." A sample of the device, and a picture of the device and bottle, are made exhibits to the bill. That the said label is, and for four years last past has been, a trade-mark of orators, their own property, and used by them in their said business to designate the said whiskey manufactured, put up in packages of said bottles, and sold by them exclusively. That orators have been engaged exclusively and extensively in the sale of said whiskey under said trade-mark for a long period of time, to wit, four years last past, and that by their diligent efforts and advertising said brand of whiskey so sold under said trade-mark has acquired extensive demand and wide reputation for its excellence and good qualities, and is a favorite brand in the trade in the Southern states generally, and in said Montgomery. The orators have used the said label and other constituent features of their trade-mark or device without change for four years last past, and that they are now using them, and they aver that they have the exclusive right to the use of the label and other parts of said device or trade-mark,

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and that the same is their property for the uses and purposes aforesaid, to which they are entitled to the exclusion of all others. That defendants, well knowing the right of orators in and to said trade-mark or device as above described, and since orators' rights were acquired and since orators became exclusively entitled in the premises, and wholly without orators' consent, and in violation of their rights, have fraudulently and unlawfully offered for sale and sold their so-called whiskey, of a very inferior quality, not manufactured or put up by orators, which has been put up and contained in bottles resembling those used by your orators in size, shape, color, and appearance. And the defendants have attached to the bottles containing their whiskey, which bottles are similar in size, shape, and appearance to those used by orators, a label or labels containing thereon the words: "Old Jack, J. W. E. Rye Whiskey. J. W. Epperson & Co., Sole J. W. E. Proprietors, Montgomery, Ala."—and also an illustration of a man's head and bust. The said labels so used by the defendants are of substantially the same size and shape, and gotten up in the same style, and with the use largely of the same type as the label used by orators. And the defendants have also, for the purpose of more closely copying orators' package, fraudulently and unlawfully attached to their said bottles a corkscrew similar in size and appearance to those attached to bottles put up by orators, and sold by them, and the said defendants have also pasted along the neck of the said bottles and over the corks therein a label similar in size and shape and appearance to that used in a like manner by your orators as above set out, containing the words: "Not genuine unless this seal is unbroken." That defendants have actually sold and continue to sell whiskey put up in said packages and as the product of the manufacture of orators, representing it to be such when asked for that brand of whisky, under the labels and devices used by defendant as above set out. And orators further show that the defendants, by the use, fraudulently and falsely, of the words, pictures, label, corkscrew, and bottles as shown above, are guilty of unfair and fraudulent competition in business, and that it is inequitable and unlawful, and have en-

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abled, and necessarily have the effect of causing, the sale and substitution of the whisky bearing the label of the defendants for the whisky of orators, to their great injury and damage. The complainants asked for an accounting and a restraining order preventing defendants forever from the use of the label and other devices. Demurrers were interposed to the bill, but it is not necessary to set them out.

The defendants filed a sworn answer, denying the material allegations of the bill, and in addition thereto filed four pleas, the first three of which were held sufficient, and which are as follows: "(1) That there appears on complainants' label, sought to be protected by the bill, as will be observed from the illustration thereof in the exhibit to the bill, the letters 'V. O. S.' That the common meaning of said letters, and the acceptance thereof by all persons engaged in the liquor business, when said letters appear on packages containing whiskey is 'Very Old Stock.' That said letters are usually placed on packages containing whisky for the purpose of indicating to the public that the whiskey contained therein is of a very old stock. The respondents aver that the complainants, well knowing the meaning of said letters, placed the same on their labels, as appears in said exhibit to the said bill, for the purpose of representing and indicating that the whiskey contained in the bottles offered for sale by complainants was very old stock; but, on the contrary, respondents aver that the whisky contained in the bottles of complainants and offered for sale by complainants is not very old stock, but is a blend whisky of very ordinary character, with no age and a cheap and inferior grade. And respondents aver, further, that complainants, well knowing that said whisky was not very old stock, placed said labels on said bottles in order to deceive the public, and in order to falsely represent to the public the character of whisky contained in said bottles. Wherefore respondents say that the complainants are not entitled in this honorable court to the relief and protection prayed for. (2) That there appears on the bottles sought to be protected by this bill of complaint, and blown in said bottles on the back thereof, the words: 'Bluthenthal & Bickart. B. & B.

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Fine Old Whiskey.' And respondent aver that the complainants placed the said words on said bottles for the purpose of indicating and representing that the whiskey contained therein was fine old whiskey; but on the contrary, said whiskey contained therein is a blend whiskey of a very inferior grade, and is nothing more than common, ordinary whiskey. Respondents further aver that the complainants, well knowing that the whiskey so offered for sale by them and contained in said bottle was not a fine old whiskey, placed said words on the back of said bottle for the purpose of deceiving the public, and thereby falsely representing the character of the whisky contained in said bottle. Wherefore they are not entitled in this honorable court to the relief and protection prayed for. (3) And for further answer to said bill of complaint as a whole, and separately and severally to each paragraph thereof, by way of answer as well as plea, these respondents say that there appears on the complainants' label sought to be protected by their bill, as will be observed from the illustration thereof, in exhibit to said bill, the words 'Rye Whiskey,' and which said words, appearing in large letters, occupy a prominent and conspicuous place on said label; and these respondents aver that the whiskey placed in said bottles alleged to be put up and sold by the complainants, and upon which said labels are pasted by complainants, is not rye whiskey; and respondents further aver that complainants placed the words 'Rye Whiskey' on their said labels for the purpose of indicating and representing that the whiskey contained therein was rye whiskey, well knowing at the time that the whiskey so offered for sale, and represented on said labels as being rye whiskey, was not rye whiskey; all of which was done, as respondents aver, by the complainants, for the purpose of deceiving the public and thereby falsely representing the character of whiskey contained in said bottles and offered for sale by them." The fourth plea was held insufficient, and, as no point was made on it, it is not here set out.

There was evidence tending to support the allegations of the bill, and the denials of the answer; but most of the facts were addressed to the pleas, the great weight

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of the testimony going to support the allegations of the pleas. Upon a submission of the cause on the pleadings and proof, the chancellor decreed the relief prayed, and perpetually enjoined respondents from the use of the labels and devices set out in the bill.

STEINER, CRUM & WEIL, for appellants.—The motion to dismiss the bill for want of equity and the demurrers thereto should have been sustained.—*Kyle v. Perfection Mattress Co.*, 127 Ala. 39; *Lawrence Mfg. Co. v. Tenn. Mfg. Co.*, 138 U. S. 537; *Hoyte v. Hoyte*, 143 Penn. St. 623, 24 Am. St. Rep. 575; *Fleischmann v. Starkey*, 25 Fed. 127; *Cady v. Schultz*, 19 R. I. 193; 61 Am. St. Rpts. 763; *Amoskeag M. Co. v. Trainer*, 101 U. S. 51; 25 L. Ed. 993; *Ball v. Seigel*, 116 Ill. 37; 56 Am. St. Rpts. 766; *Continental Tobacco Co. v. Lazarus*, 133 Fed. 727; *Enoch Morgan's Sons Co. v. Troxell*, 89 N. Y. 292.

The bill does not make out a case of unfair competition.—28 Am. & Eng. Ency. of Law (2nd Ed.) 345; *Postum Cereal Co. v. American Health Food Co.*, 119 Fed. Rep. 848. The shape and size of the bottle, the color, shape and size together with the lettering on the label are common property.—*Brown v. Brocher*, 147 N. Y. 647; *Enoch Morgan etc. v. Troxell*, *supra*; *Continental Tobacco Co. v. Lazarus*, *supra*; *Sterens Linen Works v. Williams*, 121 Fed. 171; *Ib.*, 127 Fed. 950; *Heide v. Wallace*, 129 Fed. 649; *G. W. Cole v. American Cement Oil Co.*, 130 Fed. 703; *Continental Tobacco Co. v. Lazarus*, *supra*; *Centaur Co. v. Marshall*, 97 Fed. 785; *Allen B. Wrisley Co. v. Iowa Soap Co.*, 122 Fed. 796; *Hubinger Bros. v. Eddy*, 74 Fed. 551; *Proctor et al. v. Globe Refining Co.*, 92 Fed. 357; *P. Lorillard Co. v. Pepper*, 86 Fed. 956; *Uri v. Hirsch*, 131 Fed. 658; *Amoskeag Mfg. Co. v. Trainer*, *supra*; *Faulkenberry v. Lucy*, CE Cal. 52; 92 Am. Dec. 76; *Solis Cigar Co. v. Pazo*, 25 American State Reports 279; *Fleischman v. Newman*, 51 Hun. 641; *Bobbitt v. Brown*, 23 New York Sup. 25; *Hoyt v. Hoyt*, 24 Am. St. Reports 575; *Brown v. Dostor*, 147 N. Y. 647; *Gessler v. Gessler*, 27 Am. St. Reports, 20; 80 Wis. 21.



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The court erred in holding plea 4 insufficient. The doctrine that he who comes into equity must come with clean hands has been applied frequently and generally in trade mark and unfair trade cases.

*Uri v. Hirsch, supra; Manhattan Med. Co. v. Wood*, 108 U. S. 218; 27 L. Ed. 706; *Warden v. Cal. Fig Syrup Co.*, 187 U. S. 516; *Prince Mfg. Co. v. Prince Metallic Paint Co.*, 135 N. Y. 24; *Solis Cigar Co. v. Pozo, supra; Allan B. Wrisley Co. v. Iowa Soap Co., supra.*

HILL, HILL & WHITING, for appellee.—Independently of the existence of any technical trade mark no one will be allowed to dress up his goods by the use of names, words, labels or wrappers, or by the adoption of style, form or color of packages, or by the combination of any or all of these indicia, so as to cause purchasers to be deceived into buying these goods as and for the goods of another.—*McLean v. Fleming*, 97 U. S. 245; *Schaur v. Miller*, 20 C. C. A. 168; *Fischer v. Blank*, 148 N. Y. 244. The label of appellant is sufficient to establish unfair competition.—*Consolidated Fruit Co. v. Thomas*, 6 Fed. 331; *Taylor v. Taylor*, 23 Eng. Law & Eq. 282; *Curtis v. Bryan*, 2 Daly 312; *Wertz v. Bottling Works*, 24 Atl. 658; *Simmons Medicine Co. v. Mansfield Drug Co.*, 93 Tenn. 84; *Stewart v. Stewart Co.*, 91 Fed. 243; *Drummond Tobacco Co. v. Addison*, 52 Mo. App. 10; *Cauffman v. Schuler*, 123 Fed. 205; *Pillsbury v. Pillsbury*, 64 Fed. 841; *VonMunn v. Frash*, 56 Fed. 830; *Centaur Co. v. Robertson*, 91 Fed. 889; *Hansell v. Siegal-Cooper & Co.*, 106 Fed. 690; *Cantrell v. Cochran*, 124 Fed. 290; *National Biscuit Co. v. Swick*, 121 Fed. 1007; *Leggett Tobacco Co. v. Hynes*, 20 Fed. 883; *Swift & Co. v. Brenner*, 127 Fed. 826. The similarity of the labels being established it is not necessary to show actual deception.—Authorities *supra*; *Ohio Baking Co. v. National Baking Co.*, 127 Fed. 116; *Manitowoc Mauling Co. v. Milwaukee Mauling Co.*, 119 Wis.; *National B. Co. v. Baker*, 95 Fed. 135; *Collinsplatt v. Filayson*, 88 Fed. 692; *Fairbanks Co. v. Bell Mfg. Co.*, 77 Fed. 869; *Annhauser Busch v. Piza; Scheuer v. Miller*, 74 Fed. 225. The pleas of defendant

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were not proven; *Tarrant & Co. v. Johan & Hoff*, 76 Fed. 459; *Hostetter v. Martoni*, 110 Fed. 527; *Samuel Bros. v. Hostetter*, 118 Fed. 257.

ANDERSON, J.—One who has adopted a trade-mark to identify his production, and and by his labor and skill has created a valuable market therefor, and has induced public confidence in the superior quality of his goods, whether based on the skill used in the manufacture, or the material from which they are made, or both combined, is entitled, so long as he deals honestly with the public, to be protected against those who, without right, attempt to appropriate his symbol and apply it to other goods of the same class. The jurisdiction of equity, however, to restrain the infringement of a trade-mark, is founded upon the right of property in the complainant and its fraudulent invasion by another, and is exerted to prevent fraud upon him and upon the public, and a party invoking its aid must himself be free from fraud. Any material misrepresentation, therefore, in a label or trade, as to the person by whom the article is manufactured, or as to the place where manufactured or as to the materials composing it, or any other material false representation, deprives a party of the right of relief in equity, although the respondents' conduct is without justification.—*Uri v. Hirsch*, (C. C.) 123 Fed. 568; *Manhattan Med. Co. v. Wood*, 108 U. S. 218, 2 Sup. Ct. 436, 27 L. Ed. 706; *Worden v. Cal. Fig Syrup Co.*, 187 U. S. 516, 23 Sup. Ct. 161, 47 L. Ed. 282; *Prince Mfg. Co. v. Prince Paint Co.*, 135 N. Y. 24, 31 N. E. 990, 17 L. R. A. 129; *Solis Cigar Co. v. Pogo* (Colo.) 26 Pac. 556, 25 Am. St. Rep. 279; *Wrisley Co. v. Iowa Soap Co.* (C. C.) 104 Fed. 548. The evidence in the case at bar leads to the irresistible conclusion that the contents of the bottles of complainants fell far short of what the label and lettering would indicate, and that the bottles were so labeled and lettered to induce the public to believe that they were getting a quality of whiskey far superior to what they actually bought.

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The judge of the city court erred in granting the complainants relief. The decree is reversed, and one is here rendered dismissing the bill.

Reversed and rendered.

TYSON, C. J., and DOWDELL and McCLELLAN, JJ.,  
concur.

### Harris v. Theus, et al.

#### *Bill to Restrain Another From Engaging in Turpentine Business.*

(Decided Feb. 14th, 1907. 43 So. Rep. 131.)

1. *Contracts; Restraint of Trade; Legality.*—Although contracts in general restraint of trade are void as against public policy, a contract is valid and enforceable under which one sells another pine lease lands and agrees not to engage in the turpentine business within ten miles of a certain place so long as another is engaged in that business there.
2. *Same; Construction.*—A contract that A. will not engage in the turpentine business within ten miles of a certain place so long as B. operates a still at that place, prevents A.'s engaging in the business, although B.'s turpentine still is outside the corporate limits of the town.
3. *Same; Sufficiency of Consideration.*—The purchase of the turpentine business and leases by B. was a sufficient consideration for the covenant that A. would not engage in that business within ten miles of the town so long as B. remained there in business.
4. *Injunction; Breach of Contract; Stipulation for Damages for Breach.*—That the contract stipulated for damages for its breach does not oust the jurisdiction of equity to enjoin a breach of the contract.
5. *Same; Trade Agreement.*—It is not necessary to wait until one engages in a business which will breach the contract, to invoke the aid of equity, as equity will enjoin a preparation to begin the business.
6. *Same; Parties Defendant; Husband and Wife.*—Upon the allegation that defendant and his wife designed to evade an agreement made by defendant not to engage in a certain business,

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by arranging to establish the business in the name of the wife, the wife is a proper party defendant to a proceedings to enjoin a breach of the agreement.

APPEAL from Geneva Chancery Court.

Heard before Hon. W. L. PARKS.

Action by R. L. Theus against W. H. Harris and another. From a decree for plaintiff, defendants appeal. Affirmed.

This was a bill filed by Theus against the Harrises for an injunction to restrain the said Harris from engaging in or carrying on the business of buying crude gum and distilling turpentine within 10 miles of the town of Geneva. The bill is based on a contract wherein Theus purchased of Harris certain leases of pine land for turpentine purposes and erected a distillery for the manufacture of turpentine, and a covenant in said contract that said Harris would not engage in the naval stores business within 10 miles of the town of Geneva, so long as Theus should be engaged in said business at Geneva. The allegations of the bill and of the answer, together with the pleadings in the cause, are sufficiently set out in the opinion of the court. The chancellor declined to dismiss the bill for want of equity, overruled the demurrer thereto, and on a final hearing decreed that complainant was entitled to the relief prayed for. From this decree, respondents appeal.

C. D. CARMICHAEL, and W. R. CHAPMAN, for appellant.—The court erred in overruling Harris's motion to dismiss the bill for want of equity. "At Geneva" can mean nothing but inside the corporate limits of Geneva and the bill avers that the still is operated near Geneva. The court erred in overruling the first three grounds of demurrers to the bill.—87 Ala. 206; 108 Ala. 451; 127 Ala. 110. The 4, 5, 6, 7, and 8th grounds should have been sustained. The 9th, 10th and 11th grounds of demurrer were improperly overruled.—*McCurry v. Gibson*, 108 Ala. 451. The 1st, 2nd, 3rd, 5th, 6th, 7th, 8th, 9th and 10th grounds of demurrer interposed by M. Harris should have been sustained.—104 Ala. 599.—There is a vast difference between the prin-

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ciples invoked in the present case and those announced in *Moore-Handley Hdw. Co. v. Towers Hdw. Co.*, 87 Ala. 206.

W. O. MULKY, for appellee.—The motion to dismiss the bill was properly overruled. The authorities are against the contention that the contract under consideration is void as against public policy.—*Tuscaloosa I. Mfg. Co. v. Williams*, 28 South. 671; *McCurry v. Gibson*, 108 Ala. 455; *Robins v. Webb*, 68 Ala. 393; *Moore* in the opinion of the court. The chancellor declined to dismiss the bill for want of equity, overruled the demurrer thereto, and on a final hearing decreed that complainant was entitled to the relief prayed for. From this decree respondents appeal.

*v. Towers Co.*, 87 Ala. 206; *Moore v. Bonnett*, (Ill.) 15 L. R. A. 364; 46 L. R. A. 266, (N. J.); 41 L. R. A. (Mass.); 32 L. R. A. 829, (N. C.); 11 L. R. A. 437, (Minn.) and notes. The demurrers of W. H. Harris were properly overruled.—*McCurry v. Gibson*, *supra*. The demurrers of M. Harris were properly overruled.—*Hudspeth v. Tomason*, 45 Ala. 475; *Merchants Bank v. Lauchlin*, 102 Ala. 452; 15 A. & E. Ency. P. & P. 611; *Moore, et al. v. Towers, et al.*, *supra*.

DENSON, J.—It may be conceded as being the general rule in all the states, as well as in England, that contracts in general restraint of trade are void as against public policy.—24 Am. & Eng. Ency. Law (2d Ed.) 842; 3 Am. & Eng. Ency. Law (1st Ed.) p. 882; 9 Cyc. 525; 2 Pom. Eq. Juris. § 934; *McCurry v. Gibson*, 108 Ala. 451, 18 South 806, 54 Am. St. Rep. 177; *Brewer v. Marshall*, 19 N. J. Eq. 537, 97 Am. Dec. 679; *Mitchell v. Reynolds*, 1 P. Wms. 181; *Trenton Potteries Co. v. Oliphant* (N. J. Eq.) 43 Atl. 723, 46 L. R. A. 255, 78 Am. St. Rep. 612. "In determining what is the public policy in this regard, we have to take into account certain contracts which restrain trade. It is of public interest that every one may freely acquire and sell and transfer property and property rights. A tradesman, for example, who has engaged in a manufacturing business, and has purchased land, installed a

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plant, and acquired a trade connection and good will thereby, may sell his property and business, with its good will. It is of public interest that he should make such a sale at a fair price, and that his purchaser shall be able to obtain by his purchase that which he desired to buy. Obviously, the only practical mode of accomplishing that purpose is by the vendor's contracting for some restraint upon his acts, preventing him from engaging in the same business in competition with that which he has sold. His contract to abstain from engaging in such competitive business is a contract in restraint of trade, but one which has been recognized as not inimical to, but permitted by, public policy. Therefore, while the public interest may be that trade in general shall not be restrained, yet it also permits and favors a restraint of trade in certain cases. Contracts of this sort, which has been sustained and enforced by courts, have been generally declared to be such as restrain trade, not generally, but only partially, and no more extensively than is reasonably required to protect the purchaser in the use and enjoyment of the business purchased, and are not otherwise injurious to the public." This is the doctrine recognized in the courts of many of the states, including our own court.—9 Cyc. 529, and cases cited in note 70; 24 Am. & Eng. Ency. Law (2d Ed.) p. 850; *McCurry v. Gibson*, 108 Ala. 451, 18 South. 806, 54 Am. St. Rep. 177; *Tuscaloosa Ice Co. v. Williams*, 127 Ala. 110, 28 South. 669, 50 L. R. A. 175, 85 Am. St. Rep. 125; *Trenton Potteries Co. v. Oliphant*, *supra*.

Without indulging in comments on, or making a review of, the many cases in which contracts in partial restraint have been upheld and enforced, we will mention some of them, with a bare statement of the nature of the contract or covenant upheld: An agreement on the sale of a magazine not to publish a similar one (*Ainsworth v. Bentley*, 14 Wkly. Rep. 630); an agreement not to engage in the business of a gasfitter within 20 miles of a certain place (*Wood v. Whitehead*, 165 N. Y. 545, 59 N. E. 357); an agreement not to carry on the business of a soap manufacturer within 40 miles of Lockport, N. Y., for 10 years (*Ross v. Sadgbeer*, 21

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Wend. 166) ; an agreement not to do business as a banker in a certain place for 10 years (*Hoagland v. Segur*, 38 N. J. Law, 230) ; an agreement not to engage in the coal or fish business for a term of 10 years (*Hitchcock v. Anthony*, 83 Fed. 779, 28 C. C. A. 80) ; a contract by the owner of an exclusive ferry franchise between two points, on the sale of it to another, never to establish a rival ferry on his own land while the other shall maintain the one sold (*Westfall v. Mapes*, 3 Grant, Cas. (Pa.) 198; 9 Cyc. p. 531 (second agreement held valid) ; 24 Am. & Eng. Ency. (2d Ed.) p. 842 (restraint of trade) Coming to our own cases: In the case of *Moore & Handley Hardware Co. v. Towers Hardware Co.*, 87 Ala. 206, 6 South. 41, 13 Am. St. Rep. 23, a contract was made between the parties, by which Moore & Handley Hardware Company sold to the Towers Hardware Company their entire stock of plow stocks and plow blades for a fixed amount, and covenanted not to handle any more plow stocks or plow blades, except railroad plows. It was held that, notwithstanding the covenant contained no express stipulation as to territory, the contract might be construed with respect to the territory over and in which the contracting parties were competitors at the time the covenant was made, which the allegations of the bill showed was all that part of Alabama lying north of the city of Birmingham; and, so construing the contract, it was there held that the covenant was a reasonable and valid one, citing numerous cases decided by the courts of other jurisdictions in support of the holding. The case of *McCurry v. Gibson*, 108 Ala. 451, 18 South. 806, 54 Am. St. Rep. 177, involved a contract by which a physician who had built up a practice in the city of Anniston sold his business to another physician, and covenanted not to practice his profession in that city for two years. In an able opinion by Head, J., in which the doctrine of illegality of contracts in restraint of trade is discussed and gone over, the covenant was held valid, and relief by injunction was granted the covenantee.

The sum of these cases is that, though there can be no general restraint of trade, yet to a certain extent it may be regulated, and by consequence to some extent re-

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strained, within a prescribed territory not unreasonable in extent. "To the rule that the restraint must be limited, and only so great as to afford adequate protection to the covenantee, it is a corollary that the covenant must be incidental to and in support of a contract or a sale by which the contractee acquires some interest in the business needing protection. A man cannot, for money alone, where he has no interest in the matter, procure a valid contract in restraint of trade, however limited may be the circle of its operation."—24 Am. & Eng. Ency. (e), p. 851, and cases cited in note 1 on page 852. It is on this principle, in part, that the contract in the case of *Tuscaloosa Ice Co. v. Williams*, 127 Ala. 110, 28 South. 669, 50 L. R. A. 175, 85 Am. St. Rep. 125, was held invalid as against public policy. In that case the covenant was that the covenantor, a competitor of the covenantee in the same city in the manufacture and sale of ice, for a sum to be paid, was not to run his ice machine in the city of Tuscaloosa for five years. No business or property was sold or purchased. So that case is easily distinguishable from the one at bar, and is not authority for striking down the contract we are considering. It was there said, among other things: "When the contractor surrenders his trade or profession, an equivalent is given the public, because ordinarily, as a part of the transaction, the contractee assumes and carries on the trade or profession. Nothing is abandoned, and only a transfer is accomplished. The same occupation continues. The same number of mouths are fed. And these considerations obtain where one already engaged in a business in good faith, for the purpose of enlarging and increasing his business, purchases the stock in trade or practice or plant of a rival, and incident thereto takes the covenant of the seller not to engage in the same business within the territory covered by the consolidated enterprise, and in all such cases the covenant in restraint of trade is a reasonable one and valid."

It is made to appear by the averments of the bill that crude gum is an article that is purchased by those engaged in the naval stores business, and that one engaged in the business at or near Geneva may obtain, and



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does purchase the gum from persons within a radius of 10 miles from the town of Geneva, and that leases of lands or the pine timber thereon located some distance from Geneva are made for the purpose of obtaining gum to be worked in the distillery, so that the place fixed by the covenant, within 10 miles of Geneva, considered in connection with the nature of the business and the purpose of the contract, seems to afford only a fair protection to the interests of the convenantee, without being so large as to interfere with the interests of the public.—*McCurry v. Gibson*, *supra*; *Robbins v. Webb*, 68 Ala. 393; 24 Am. & Eng. Ency. Law (2d Ed.) p. 844, and cases cited in note 3. In respect to the time stipulated, such contracts are not rendered invalid by a failure to specify any limit of time for its duration.—*McCurry v. Gibson*, 108 Ala., bottom of page 455, 18 South. 806, 54 Am. St. Rep. 177. The covenant in the case here is that the covenantor shall not engage in the business so long as Theus shall operate a turpentine still at Geneva, Ala., such stipulation as to time is expressly held sufficient in the following cases:—*O'Neal v. Hines*, 145 Ind. 32, 43 N. E. 946; *Eisel v. Hayes*, 141 Ind. 41, 40 N. E. 119; *Gill v. Ferris*, 82 Mo. 156; 24 Am. & Eng. Ency. pp. 847, 848; 9 Cyc. 529.

It appears, as has been observed, that the covenant is that the covenantor shall not enter into nor engage in the turpentine business at any point within 10 miles of the town of Geneva so long as the convenantee shall operate turpentine still at Geneva. The bill avers that, "soon after taking possession of the property purchased from Harris, complainant erected, at considerable expense, a turpentine distillery near Geneva; said town being the shipping point of complainant." The contention of Harris (the covenantor) is that this averment does not show that complainant is operating a still "at" Geneva, that operating the still "near" Geneva does not show the operation of it "at" Geneva, and, therefore, that no breach of the covenant is shown by the bill. The proof shows that the complainant's distillery is a mile from the courthouse that is located in the town of Geneva, and is a half mile from the corporate limits; but in construing the bill on motion to dismiss, and on

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demurrer, we cannot look to the proof. So we must determine the meaning of the words "at" as used in the covenant and "near" as used in the bill. In 4 Cyc. p. 365, we find the word "at" defined as follows: "At. A word of somewhat indefinite meaning, whose significance is generally controlled by the context and attending circumstances, denoting the precise sense in which it is used. Used in reference to place, it often means 'in' or 'within'; but its primary sense is 'nearness' or 'proximity,' and it is commonly used as the equivalent of 'near' or 'about.'" In the case of *Rogers v. Galloway Female College* (Ark.) 44 S. W. 454, 39 L. R. A. 636, 639, Rogers had subscribed \$2,500 for the purpose of inducing the location, building, and maintaining of a college for the education of females at the town of Searcy. The college was erected near to, but not within the corporate limits of Searcy. The payment of the subscription was resisted for this reason. The Supreme Court of Arkansas held that the defense was not well made, and, in respect to the definition of "at," said, in part: "The preposition 'at,' when used to denote local position, may mean 'in' or 'near by,' according to the context, denoting usually a place conceived of as a mere point. Primarily, this word 'at' expresses the relations of presence, nearness in place." See, also, *Williams v. Ft. Worth & N. O. Ry. Co.*, 82 Tex. 553, 18 S. W. 206, 208. *O'Conner v. Nadel*, 117 Ala. 595, 598, 23 South. 532, was a foreclosure suit, and the property in the mortgage was described as the property known as the "town property" of said Attalla Iron & Steel Company, at Attalla, as indicated by a certain map of the lands. It was contended that the property was described as in the town of Attalla. This court through HARALSON, J., said: "It is plain to all intents that the property mortgaged was the property that once belonged to said company at Attalla, which does not necessarily mean in, but in or near, Attalla. The preposition 'at' denotes, primarily, 'nearness, or direction towards.'"—*Ray v. State*, 50 Ala. 172, 173. In respect to the word "near," we find that it is a relative term, its precise meaning depending on circumstances; but it has been time and again judicially held to be a synonym of "at." See the cases in note

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on page 447 of 21 Am. & Eng. Ency. Law. Upon the face of the contract and the averments of the bill we find nothing that requires it to be held that "at," as used in the contract, means within the corporate limits of Geneva, and the averment of the erection of the distillery near Geneva is sufficient.

It sufficiently appears that the covenant is based on a valuable consideration. The sale of the business is sufficient consideration for the covenant.—24 Am. & Eng. Ency. Law, 853; *McCurry v. Gibson*, *supra*.

It is next insisted that, as the covenant stipulates for a fixed sum as liquidated damages for breaches of the covenant, the covenantee has a complete remedy at law, which ousts the jurisdiction of the court of chancery. In the case of *McCurry v. Gibson*, *supra*, the covenant provided, in terms, for a forfeiture of \$200 for a failure on the part of the covenantor to comply with its terms. This court held that this was only a valid agreement for liquidated damages, and said, in respect to the insistence there made, that the equitable jurisdiction was ousted; that, while there are some cases decided by courts of last resort which hold to that view, they are opposed to the weight of authority; and that such a provision for liquidated damages does not oust the jurisdiction of the chancery court and is no bar to a decree for specific performance—citing *Morris v. Lagerfelt*, 103 Ala. 609, 15 South. 895. In studying the covenant in the case at bar we have found nothing to withdraw it from the influence of the ruling made in that case.—3 Pom. Eq. Jur. § 1344. Jurisdiction of equity is generally exercised, in respect to these contracts, for the purpose of indirectly compelling their specific performance by means of an injunction preventing their violation.

It is not indispensable that the covenantee should wait until the covenantor should begin to operate a distillery before invoking the aid of the chancery court. The bill shows that W. H. Harris, in violation of the agreement, ordered shipped to Geneva a turpentine distillery, which, in order to evade the binding force of the covenant, he had billed to his wife, Maggie Harris, his co-respondent; that W. H. Harris has erected said distillery, procured gum for distilling, and is making all

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preparations to engage in the turpentine business again "in" the town of Geneva; that he has purchased barrels, wood for fuel, and mules, and is buying gum and employing laborers. To all intents and purposes these allegations show a present purpose to immediately begin the operation of the business, and are quite sufficient to set in motion the jurisdiction of equity to prevent the violation of the contract by injunctive relief. In addition to the allegations of the bill above adverted to, in respect to the operation of the distillery by W. H. Harris, it is averred in the sixth paragraph of the bill that "said W. H. Harris, pretends in said matter to be acting as the agent of his wife, Maggie Harris, and pretends to be operating the said distillery in her name. But complainant avers that said Maggie Harris has no experience in the naval stores business, and has no capital invested in said business, or, if any, that it is property or money advanced to her by her husband, and that her name is being used in said business merely for the purpose of permitting the said W. H. Harris to avoid and evade the contract made with the complainant. Complainant further avers that the use of the name of Maggie or M. Harris in connection with the operation of said business was devised by the said W. H. Harris, and acquiesced in by Maggie Harris, purely for the purpose of trying to dodge said contract and defrauding complainant, and that in reality the said W. H. Harris is the only person who has any interest in said plant; or, if complainant is mistaken in this, he avers that the said Maggie Harris knew of the contract existing between the said W. H. Harris and complainant, and that she is permitting her name to be used in said business in order, as respondents properly think, to avoid said contract.

It is insisted by demurrer that the bill shows that the business sought to be enjoined belongs to W. H. Harris, and on this account that Mrs. Harris is not a proper party to the bill; further, that, if the business belonged to Mrs. Harris, then she is not a proper party. Equity abhors shams and subterfuges, and delights in looking through the mere surface and form of a transaction, and in scrutinizing closely the merits and substance. Assuming the truth of the foregoing allegations, a com-

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bination between the respondents, a common design to defeat complainant's rights under the contract and to avoid the obligations of W. H. Harris which attached to him not to enter the turpentine business, is charged. In this view Mrs. Harris is a proper party to the bill. In order that the court may properly protect and enforce the rights of the complainant, the decree under the allegations will affect her interests.—15 Am. & Eng. Ency. Law, pp. 611, 612, 613 and 614; *Hudspeth v. Thomason*, 46 Ala. 470; *Moore & Handley Hardware Co. v. Towers Hardware Co.*, 87 Ala. 206, 211, 6 South. 41, 13 Am. St. Rep. 23.

It follows, from the foregoing considerations, that the motion to dismiss the bill for want of equity made by W. H. Harris and the separate demurrers filed by the respondents were properly overruled.

This brings us to the consideration of the cause on the merits. Separate answers are filed by the respondents, in which the contract alleged in the bill as having been made between the complainant and W. H. Harris is admitted, and it is also admitted that a turpentine distillery has been erected in Geneva since the making of said contract, and that it was about to be put in operation at the time the bill was filed; but it is expressly denied that W. H. Harris was concerned in the erection of said distillery, or in the preparation of it for operation, either individually or as an agent for his wife. It is also denied that Mrs. Harris's name is being used in connection with the operation of the distillery, or that she acquiesced in the use of her name for the purpose of evading the covenant in the contract, and it is averred that the distillery is the property of Mrs. Harris, that it was purchased by her on her own responsibility and erected for her sole use, and that W. H. Harris is in no respect interested in or responsible for its erection or operation. The allegations in regard to the combination between the respondents for the use of the wife's name are also denied. So upon the admissions made in the answer, it seems that the only questions or issues to be determined on the merits are whether or not the distillery is an enterprise of W. H. Harris, whether it belongs to him and the purchase and operation of it in his wife's name is a

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subterfuge, to enable him to violate the contract, or, if the property is not his, but is Mrs. Harris', did she erect it in good faith, to be operated for her benefit, or did she, knowing that the husband was prohibited by his covenant from operating the distillery, enter into a combination with him in the purchase and the erection of the still in her name to evade and "dodge" the contract? These issues are the substance of the allegations upon which the prayer for relief is based. The evidence has been carefully considered, and from the legal evidence in the case, if it be granted that the legal title to the distillery, as between the respondents, is in Mrs. Harris, yet we are of the opinion that the evidence supports the conclusion that the purchase, erection, and operation of the still was instigated by Mr. Harris, and the use of the wife's name was resorted to by and with the consent of Mrs. Harris, all for the purpose of trying to evade the obligations of the covenant entered into by the husband. This is the effect of the chancellor's decree, and is the substance of at least one of the alternatives upon which the prayer for relief is based.

But it is insisted that the proof fails to show a violation of the contract, in that it is not shown that the complainant's distillery is located about a mile from the county courthouse in Geneva, and about a half mile outside of the corporate limits of the town; that Geneva is his shipping point for all the products of his enterprise. Construing the word "at" in the light of the circumstances shown by the evidence, and on the considerations heretofore adverted to in respect to this question and the authorities cited, we are of the opinion that this insistence is not well taken. We concur with the chancellor that the complainant has made a case entitling him to the relief prayed for, and the decree must be affirmed.

Affirmed.

TYSON, C. J., and HARALSON and SIMPSON, JJ., concur.

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## Christian Church of Huntsville, *et al.* *v. Sommer, et al.*

### *Injunction.*

(Decided Feb. 5th, 1907. 43 So. Rep. 8.)

*Injunction; Disturbance of Religious Worship.*—A bill will lie to enjoin non-members of a religious organization from forcibly entering a church, changing the locks thereon, threatening to disturb and interfere with the rights of the trustees in their possession and control of the church property, and interfering with the orderly worship of God, although civil courts will not hear and determine controversies pertaining to the ecclesiastical or spiritual features of a church.

APPEAL from Madison Chancery Court.

Heard before Hon. W. H. SIMPSON.

Bill by the Christian Church of Huntsville, Ala., and others, against Daniel Sommer and others. From a decree sustaining demurrers and a motion to dismiss for want of equity, plaintiffs appeal. Reversed and remanded.

This is a bill filed by the trustees of the Christian Church of Huntsville, Ala., against certain members of a church alleged to be an independent church and having no connection with or right to the church building concerning which this bill is filed. It is alleged that the Christian denomination, known as the Disciples of Christ, is congregational in its nature and creation, with no sovereign power independent of its own membership, but that it is governed exclusively by the will of its members in good standing, with no superior or directing power other than is found in the government of the church by its own membership. It is alleged that the defendants were formerly members of the congregation worshipping in the church building concerning which this bill is filed, but that they voluntar-

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ily withdrew from said congregation, releasing their membership therein, two years or more ago, and since their said voluntary withdrawal they have no connection with the said congregation, with no right of association therein, and no duties and obligations of said congregation resting upon them. It is further alleged that, since their withdrawal from the congregation worshipping in the said church building, they have associated themselves into an independent church relation, wholly disconnected from the church building owned by orators, and have been conducting worship in the City Hall and elsewhere in the city of Huntsville. It is further alleged that Cambron, one of the defendants, is an elder in the church; that he resides in the state of Tennessee, but that for several months he has been preaching and has had charge of the Christian Church at Dallas, a suburb of Huntsville, and has also had charge of the independent church worshipping in the City Hall at Huntsville. The defendant Daniel Sommer is alleged to reside in the city of Indianapolis, but that he is temporarily in the city of Huntsville by invitation of the members of the independent church organization preaching to them; that the defendants Cambron and Sommer, under an assumed authority, but without legal right or excuse, demanded of orators the keys to the church building, but were refused said keys, whereupon the defendant and other members of said independent church organization forcibly broke into said church building on Sunday, April 10, 1904, and unlawfully entered therein. The said defendants, under pretense of holding a church meeting and worshipping God, proceeded to change the locks of said church building, and without authority or legal excuse, and in the absence of the congregation entitled to worship in the said church building, attempted to depose the legally elected and constituted trustees of the said church organization, a corporation as aforesaid. The said defendants, after the commission of the trespass upon said church property, locked the doors of the church building, and denied admission to the legally constituted trustees (orators). and the said defendants proposed to elect trustees and oust the legally elected trustees of the said Christian



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Church; that defendants do threaten and have threatened a further trespass upon said church building, invading the rights of orators, and defying the rights of said trustees, and claiming the right to hold worship in said church building, and to expel your orators from said congregation, and to depose them as trustees of your orator the Christian Church of Huntsville, Ala. It is further alleged that a demand has been made to open the doors of the church by the defendants, and that, if the demand is not withdrawn, there will be a breach of the peace in the house of God; that every attempt of the constituted authorities to hold a meeting for the worship of God is interfered with by defendants. An injunction is prayed to restrain any further trespass, and to restrain any interference with the legally constituted authorities in the management of the property, etc. The motion to dismiss for want of equity, and the demurrers to the bill, are sufficiently set out in the opinion. This appeal is from a judgment sustaining demurreis and motion to dismiss for want of equity.

COOPER & FOSTER, for appellant.—The court erred in its action as to the motion to dismiss for want of equity and demurrer.—*Brundage v. Deardorf*, 55 Fed. 839, s. c. 92 Fed. 214; *Beatty v. Kurtz*, 2 Peters, 566; *Fullwright v. Higginbotham*, 34 S. W. 875; *Prickett v. Wells*, 24 S. W. 52; *Inglehart v. Rowe*, 47 S. W. 577; 1 High on Injunctions, § 305; 1 Ex. Rem. § 357. There is no analogy whatever between the issues presented in this case and the questions decided in the case of *Hundley v. Collins*, 131 Ala. 234.

OSCAR R. HUNDLEY, for appellees.—The bill is an effort to enjoin a trespass, and hence, without equity.—*Hamilton v. Brent Lbr. Co.*, 127 Ala. 78. Complainants have an ample remedy under section 5620, Code 1896, and hence, there is no equity in the bill.—16 A. & E. Ency. of Law, p. 354, 360; High on Injunctions, § 460; *Kellar v. Bullington*, 101 Ala. 267; *Deegan v. Verille*, 127 Ala. 471. Aside from the question of trespass the only other issues presented by the bill have

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been decided adversely to the contentions of the bill in the case of *Hundley v. Collins*, 131 Ala. 234.

MCCLELLAN, J.—Appeal from granting motion to dismiss for want of equity, and sustaining demurrers to the bill. An incorporated church is composed of two distinct elements, viz.: The church proper, as distinguished from the entity created by the act of incorporation; and the corporation itself, which has relation only to the temporalities of the institution. The purpose of the incorporation of a church is to acquire and care for the property thereof.—*Hundley v. Collins*, 131 Ala. 234, 32 South. 575, 90 Am. St. Rep. 33. As regards the purely ecclesiastical or spiritual feature of the church, the civil courts have steadily asserted their utter want of jurisdiction to hear and determine any controversy pertaining thereto.—*State ex rel. v. Bibb Church*, 84 Ala. 23, 4 South. 40; *Hundley v. Collins*, *supra*. On the other hand, the civil courts have, without hesitation, exercised their jurisdiction to protect the temporalities of the church. The court of chancery should and does exert its powers, in a proper case, to prevent the perversion of the trust estate from the charitable use of which it is devoted. When an estate is warrantably brought into a court of equity for its action, that court takes cognizance of the use to be conserved, and will send its process to protect the proper use. Equity favors charities, and possesses inherent jurisdiction to deal therewith.—*Williams v. Pearson*, 38 Ala. 299; *Brundage v. Deardorf*, (C. C.) 55 Fed. 839; *Id.*, 92 Fed. 214, 34 C. C. A. 304; *Fulbright's Case*, (Mo.) 34 S. W. 875; *Prickett's Case*, (Mo.) 24 S. W. 52; *Iglehart v. Rowe*, (Ky.) 47 S. W. 575; 1 High on Inj. § 305.

The bill here, presenting the complaint of the corporation and its trustees, rests its right to injunctive relief upon the action of strangers; three of the respondents having renounced their membership in the church about two years before the bill was filed, and the other two being nonresidents of this state, temporarily within it. This action is averred to be that of forcibly entering the church edifice, changing the locks thereon, and the threatened disturbance of and interference with the

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rights of these trustees in their management, control and possession of the church property, and of the peaceable and orderly worship of God in the church building. The motion and demurrers go to the points, namely, that complainants have an adequate and complete remedy at law, and that the bill invokes the interposition of a civil court in an ecclesiastical controversy. The latter contention is not well taken, for the reason that the wrong asserted and the remedy sought relate to the property of the church, and to the use vel non of the property for the charitable purpose evident. It is well settled that equity will restrain a threatened trespass, if the probable injury resulting from the wrongful act, if committed, cannot be atoned for in damages in a court of law. The remedy at law is inadequate, and the injury irreparable, whenever the injury is of a peculiar nature, so that compensation cannot be had.—*Deegan v. Neville*, 127 Ala. 471, 29 South. 173.

We are of the opinion that this bill has equity. Church edifices are a different class of property from that usually sought to be protected against trespassers. There are two distinguishing characteristics: The use to which the church building is devoted; and the want of commercial purpose in the possession thereof by the church. The church building is acquired and maintained for the worship of God. It is obvious that a trespass against such property—a trespass the result of which is to interfere with and disturb, if not defeat, such worship in the church building—involves the use, resting upon the property right, and, if committed, would work irreparable injury; the reason being that a violation of the right and privilege to peaceably worship in the place therefor is wholly incapable of compensation in damages. There is no standard for, or, method of, ascertainment of such damages, and yet the member, corporation, and trustee have a right to the benefit of the use arising from the possession of such trust estate, and, in the protection of that right against strangers, the powers of a court of equity may be invoked. Besides, the undisturbed control, management, and possession of the property itself must be protected against invasion by strangers, since, without the power of con-

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trol and management, the use would be vain—the great purpose jeopardized.

It results, from these conclusions, that the motion to dismiss and the demurrers should have been overruled. A decree is here entered, reversing the action of the lower court, overruling the motion to dismiss and demurrers as well.

Reversed and rendered.

TYSON, C. J., and DOWDELL and ANDERSON, JJ., concur.

## Mayfield, et al. v. Schoolar.

*Bill for Dissolution of Partnership and Other Purposes.*

(Decided Feb. 7, 1907. 43 So. Rep. 12.)

*Equity; Pleading; Defects; Motion to Dismiss; Demurrer.*—Where some of the averments of the bill give it equity, although the bill may be defective in other averments, the defects cannot be reached by motion to dismiss for want of equity, but must be pointed out by demurrer.

APPEAL from Jefferson Chancery Court.

Heard before Hon. ALFRED H. BENNERS.

Bill by Kate Bell Schoolar against J. C. Mayfield and others. From a decree overruling defendants' motion to dismiss the bill, they appeal. Affirmed.

KERR & HALEY, for appellant.—Counsel discuss assignments of error but cite no authority.

Z. T. RUDOLPH, for appellee.—No brief came to the reporter.

DOWDELL, J.—The appeal in this case is prosecuted from a decree of the chancellor overruling a motion to dismiss the bill for want of equity. One of the

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objects of the bill is the dissolution of an alleged partnership, of which the complainant was a member, and for an accounting. The averments in this respect unquestionably give equity to the bill. It may be that the bill is defective in some of the averments, but not such as may be reached by a motion to dismiss for want of equity in the bill. The proper practice in such case is to point out the defect by demurrer. The decree overruling the motion to dismiss is free from error.

Affirmed.

TYSON, C. J., and ANDERSON and McCLELLAN, JJ.,  
concur.

## Norwood v. L. & N. Railroad Co.

*Bill in Equity to Enjoin Proceedings Under a Judgment at Law and to Compel a New Trial.*

(Decided Dec. 21, 1906. 42 So. Rep. 683.)

*Judgment; Equitable Relief; Injunction; New Trial.*—Although there was no authority for holding the court at the time the new trial was granted, and the granting of the new trial was therefore void, equity has no jurisdiction to enjoin the proceedings under the judgment or to compel the granting of a new trial.

APPEAL from Limestone Chancery Court.

Heard before Hon. W. H. SIMPSON.

Bill by Louisville & Nashville Railroad Company against Willie Emma Norwood to enjoin proceedings under a judgment at law and for the grant of a new trial. The facts are sufficiently stated in the opinion of the court. There was a decree for complainant and respondent appeals.

ERLE PETTUS, for appellant.—The judgment sought to be enjoined is confessedly valid.—*State ex rel., etc. v. Spake*, 38 South. 835. The proceedings in reference

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to the motion for a new trial were void because made at a term of the court not authorized by law.—*Walker v. The State*, 38 South. 241; *Skinner v. The State*, 38 South. 242; *Ex parte Branch*, 63 Ala. 385; *Davis v. The State*, 46 Ala. 80; *Garlic v. Dunn*, 42 Ala. 404. All men are presumed to know the law and courts will not reform or redress acts of parties which are the result of a mistake in law.—*Hemphill v. Moody*, 64 Ala. 472; *Jones v. Watkins*, 1 Stew. 81; *Trustees v. Keller*, 1 Ala. 406; *Haden v. Ware*, 15 Ala. 149; *Dill v. Shahan*, 25 Ala. 694; *Town Council v. Burnett*, 34 Ala. 400; *Leslie v. Richardson*, 60 Ala. 563. Against simple mistake of law no court will grant relief.—*Ohlander v. Dexter*, 97 Ala. 483; *Clark v. Hart*, 57 Ala. 390; *Kelly v. Turner*, 74 Ala. 518.

The judgment or decree of a court of competent jurisdiction, whether the jurisdiction is exclusive or concurrent is as binding on a court of equity as on courts of law.—*Warring v. Davis*, 53 Ala. 615; *Otis v. Dargan*, 63 Ala. 178; *Norman v. Burns*, 67 Ala. 248; *Kirby v. Kirby*, 70 Ala. 370; *Waldron v. Waldron*, 76 Ala. 285. Bills to obtain a new trial in a judgment at law must be grounded as for a bill of review upon the discovery of new matter.—11 Ency. P. & P. pp. 1169 and 1184; 16 Ency. of Law, (2nd Ed.) p. 374; 2 Storey's Eq. Jur. (2nd Ed.) §§ 888 and 895a. Jurisdiction of equity cannot be invoked where there are or were adequate legal remedies.—*Birmingham Ry. & Elec. Co. v. Birmingham Traction Co.*, 25 South. 779; *Herbert v. Hoff*, 3 Stew. 9; *Nelms v. Pruitt*, 37 Ala. 389; *Pickens v. Carlisle*, 19 Ala. 686; *Broder v. Greencald*, 66 Ala. 530.

HARRIS & EYSTER, H. C. THATCH, and W. R. WALKER, for appellee.—Anciently courts of equity exercised jurisdiction in granting new trials at law in cases of manifest injustice by compelling the successful party to submit to a new trial, or be perpetually enjoined from enforcing his judgment and where occasions demand courts of equity will now interpose and grant relief.—*Floyd v. Jayne*, 6 Johns. Chy., 479, 2 N. Y. Chy., L. Ed. 190; *Marine Insurance Co. v. Hodgson*, 7 Cranch, 332, 3 L. Ed. 362; *Oliver v. Pray*, 4 Ohio, 175, 19 Am. Dec.

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595; *Kansas etc. Ry. Co. v. Fitzhugh*, 61 Ark. 341, 54 Am. St. Rep. 211, 213; *Little Rock etc. Ry. Co. v. Wells*, 61 Ark. 354, 54 Am. St. Rep. 216; *Harkey v. Tillman*, 40 Ark. 561; *Larson v. Williams*, 100 Iowa 110, 62 Am. St. Rep. 544; 2 Pom. Eq. Jur. § 836; 1 High on Injunctions, §§ 115-118; *Dodge v. Strong*, 2 Johns. Chy., 479, 2 N. Y. Chy., L. Ed. 190; *Hamblin v. Knight*, 81 Tex., 351, 26 Am. St. Rep. 818; *Valentine v. Holland*, 40 Ark. 338; *Simpson v. Hart*, 1 Johns. Chy., 91, 1 N. Y. Chy., L. Ed. 70; *Buchanan v. Griggs*, 24 N. W. Rep. 452; *N. Y. & H. R. R. Co. v. Haws*, 56 N. Y. 175; *Garrin v. Squires*, 9 Ark. 533, 50 Am. Dec. 225; *Wright v. Miller*, 1 Sand. Chy. 103, 7 N. Y. Chy., L. Ed. 256; *Strong v. Sullivan*, 2 Ga. 279, 46 Am. Dec. 390; 4 Pom. Eq. Jur. §§ 1361, 1364; *Smith v. McIver*, 9 Wheat. 534, 6 L. Ed., 153; *Lansing v. Eddy*, 1 Johns. Chy. 49, 1 N. Y. Chy., L. Ed., 55; 2 Cooley's Blackstone, (4 Ed.) 1145; *Barker v. Elkins*, 1 Johns. Chy., 465, 1 N. Y. Chy., L. Ed., 210; *Pegram v. King*, 2 Hawks, (N. C.) 605, 11 Am. Dec. 793; *Smith v. Lowry*, 1 Johns. Chy., 130, 1 N. Y. Chy., L. Ed., 156; *Dunklin v. Wilson*, 64 Ala. 162; *Cromelin v. McCauley*, 67 Ala. 542; *Campbell v. White*, 77 Ala. 397; *Coffin v. McCullough*, 30 Ala. 107; *Younge v. Shepherd*, 44 Ala. 315; *Cox v. Mobile*, 44 Ala. 611; *Headley v. Bell*, 84 Ala. 346; *Stetson v. Goldsmith*, 31 Ala. 649; *Goldsmith v. Stetson*, 39 Ala. 183; *Collier v. Falk*, 66 Ala. 223; *Tillis v. Prestwood*, 107 Ala. 618; *Forshee v. McCreary*, 123 Ala. 493.

Whether mistake is one of law, pure and simple, or otherwise, if it is induced or accompanied by other special facts giving rise to an independent equity on behalf of the mistaken person, there can be no doubt equity may interpose its aid to relieve the party so mistaken.—2 Pom. Eq. Jur. §§ 842, 844, 847, 849; *Baldock v. Johnson*, 14 Or. 542, 13 Pac. Rep. 434; *Evans v. Stroud's Admr.*, 11 Ohio, 480, 38 Am. Dec. 744; *Order of United Commercial Travellers v. McAdam*, 61 C. C. A. 22; *McNaughten v. Partridge*, 11 Ohio, 223, 38 Am. Dec. 731; *Snell v. Atlantic F. & M. Ins. Co.*, 96 U. S. 85, 25 L. Ed. 52, 55; *Standard Oil Co. v. Hawkins*, 20 C. C. A. 468, 33 L. R. A. 739; *Renard v. Clink*, 91 Mich. 1, 30 Am. St. Rep. 458, and note; 16 Cyc. 73-75; *Benson v.*

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*Bunting*, 127 Cal. 532, 78 Am. St. Rep. 81; *Griswold v. Hazard*, 141 U. S. 260, 35 L. Ed. 678, 688; *Cooper v. Phibbs*, 22 Eng. Rul. Cases, 870; *Ala. & Vicks. Ry. Co. v. Jones*, 73 Miss. 110, 55 Am. St. Rep. 488, and note; *Benson v. Markoe*, 37 Minn. 30, 5 Am. St. Rep. 815; *Drew v. Clarke*, Cooks, (Tenn.), 373, 5 Am. Dec. 698, 701; *Lowndes v. Chisholm*, 2 McCord's Chy. 455, 16 Am. Dec. 667; *Daniel v. Sinclair*, 18 Eng. Rul. Cas. 144; *Lawrence v. Baubien*, 2 Bailey, 623, 23 Am. Dec. 155; *Pusey v. Desbouvrie*, 10 Eng. Rul. Cas. 351; *Sackett v. Elliott*, 108 U. S. 132, 27 L. Ed. 678, 682; *Thompson v. Phoenix Ins. Co.*, 136 U. S. 287, 34 L. Ed. 408, 412; *Insurance Companies v. Raden*, 87 Ala. 311.

"There are many cases to be found in which equity, upon a mere mistake of law, without the admixture of other circumstances, has given relief to a party who has dealt with his property under the influence of such mistake."—*Lord Beauchamp v. Winn*, 22 Eng. Rul. Cas. 889, 896; *Cobbs v. Coleman*, 14 Texas 594; *Miller, Admr. v. Hall*, 12 Texas 56; *Hunt v. Rousmanier*, 8 Wheat. 174, 5, L. Ed. 589; *Cooper v. Phibbs*, 22 Eng. Rul. Cases, 870; *Black v. Ward*, 27 Mich. 191, 15 Am. Rep. 162, note 171; 30 L. R. A., note page 797; *Benson v. Markoe*, 27 Minn. 30, 5 Am. St. Rep. 816; *Lane v. Holmes*, 55 Minn. 379, 43 Am. St. Rep. 508, 512.

When judgment is rendered by a common law court of general jurisdiction by accident or mistake or through fraud, or any fact exists which proves it to be against conscience to execute the judgment and there was no fault to the injured party or his agent equity will enjoin the judgment.—2 Pom. Eq. Jur. §§ 836, 871; 4 Pom. Eq. Jur. §§ 1364, 1376, 1377; 61 Central Law Journal, 401; 1 Spell on Inj. & Extr. Rem. § 83; *Phillips v. Negley*, 171 U. S. 665, 29 L. Ed. 1013; *Duncan v. Lyons*, 3 Johns. Chy., 356, 8 Am. Dec. 513; 1 High on Injunctions, §§ 112-114, 165, 178, 183, 185; *Marine Ins. Co. v. Hodgson*, 7 Cranch. 332, 3 L. Ed. 362; *Smith v. Lowry*, 1 Johns. Chy. 320, 1 N. Y. Chy., L. Ed. 156; *Scott v. Shreere*, 12 Wheat. 605, 6 L. Ed. 744; *Black v. Ward*, 27 Mich. 191, 15 Am. Dec. 162, and note 171; *Oliver v. Pray*, 4 Ohio 175, 19 Am. Dec. 595, and note 603; *Blight v. Tobin*, 7 T. B. Monroe, (Ky.), 612, 18



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Am. Dec. 219; *Yancey v. Downer*, 5 Litt. (Ky.), 8, 15 Am. Dec. 35; *Foster v. State Bank*, 17 Ala. 672; *Watts v. Cobb*, 32 Ala. 530; *Hair v. Lowe*, 19 Ala. 224; *Moore v. Dial*, 3 Stew. 155; *Weems v. Weems*, 73 Ala. 462; *Golden v. Golden*, 102 Ala. 553; *Collier v. Falk*, 66 Ala. 223; *Howell v. Motes*, 54 Ala. 1; *Norman v. Burns*, 67 Ala. 248; *James v. James*, 55 Ala. 525; *Robinson v. Reid's Exrs.*, 50 Ala. 70; *Bolling v. Spelling*, 96 Ala. 269.

If a party fails in the assertion of a good legal defense, or pre-termins a defense at law, he may, nevertheless, avail himself of an independent ground of equitable relief in a court of equity.—*Greenlee v. Gaines*, 13 Ala. 198; *Howell v. Motes*, 54 Ala. 1; *Snediker v. Boyleston*, 83 Ala. 408. Where a defense is even properly available in an action at law, yet equity, where special circumstances are shown as grounds therefor, will enjoin a judgment recovered at law.—*Foster v. State Bank*, 17 Ala. 673; *Watt v. Cobb*, 32 Ala. 530; *Taliaferro's Admr. v. Branch Bank*, 23 Ala. 755; *Howall v. Motes*, 54 Ala. 1; 1 High, Injunctions, §§ 165, 185, 209-210. An inferior court judgment may be enjoined where complainant shows a good defense on the merits, which he was prevented from making by dismissal of his appeal because of mistake of clerk in improperly drawing appeal bond, provided the complainant is without fault in causing or in not discovering mistake.—*Oliver v. Pray*, 4 Ohio, 175, 19 Am. Dec. 595; 1 High on Injunctions, § 213.

The complainant here has a meritorious defense to the action at law. Under the allegations of the complaint, it must be shown that the plaintiff's injuries were occasioned solely by the negligence or improper conduct of the defendant.—*McDonald v. Montgomery St. Ry. Co.*, 110 Ala. 161-167, 20 So. 317; *Railway Co. v. Schaufler*, 75 Ala. 137; *Railway Co. v. Holmes*, 97 Ala. 332, 12 So. 286; *Holland v. Railway Co.*, 91 Ala. 455, 8 So. 524; *Railway Co. v. Bradford*, 86 Ala. 574, 6 So. 90. The *allegata* and the *probata* must correspond.—*Pryor v. L. & N. R. R.*, 90 Ala. 32; *L. & N. R. R. v. Davis*, 91 Ala. 487; *Hood v. Pioneer M. & M. Co.*, 95 Ala. 461; *A. G. S. R. Co. v. Hall*, 105 Ala. 599; *Conrad*

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*v. Gray*, 109 Ala. 130. Causal connection must be shown between the negligence and the injury.—*Thompson v. L. & N. R. R. Co.*, 91 Ala. 496; *Bromley v. B'ham. Min. Ry. Co.*, 95 Ala. 397; *Western Ry. Co. v. Mutch*, 97 Ala. 194; *L. & N. R. R. Co. v. Stutts*, 105 Ala. 368; *Butcher v. West Va. & Pittsburg Ry. Co.*, 18 L. R. A. page 519.

SIMPSON, J.—This case is a bill in chancery to enjoin proceedings under a judgment at law, and to grant a new trial of the case. The facts, in short, are that the appellant, as plaintiff in the suit at law, recovered a judgment against the appellee in the circuit court of Limestone county on January 20, 1904; the said court being presided over by Hon. Paul Speake, who became judge under the act known as the "Lusk Bill," which has been declared unconstitutional, but whose acts as a de facto judge have been held to be valid when the court was held at a time authorized by the previous law. Said 20th of January, 1904, was within the proper time under said previous law, and the judgment was consequently valid. Under said previous law said term came to an end on January 23, 1904. On January 28, 1904, the defendant (appellee here) placed on the docket a motion for a new trial, and on January 30th (which would have been the last day of the term under the Lusk bill) this motion was continued, on application by the plaintiff (appellant here), and on the 14th of April, 1904, within the time for the legal term of said court, the parties being present by their attorneys, and the said motion duly considered by the court, the same was granted. Appellee claims that this court stood adjourned by operation of section 922 of the Code of 1896, on the 13th. Although the 14th of April, 1904, the day on which the motion for the new trial was granted by the de facto judge, was within the time prescribed by law for the holding of said court, yet said law required said court to meet on the 4th day of April, and as a matter of fact the court did not meet until the 11th of April, the day fixed by the Lusk act for meeting. That being the case, section 922 of the Code of 1896 provides that, "when a circuit judge fails to attend,

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the court stands adjourned from day to day until 3 o'clock in the afternoon of the third day, when it is adjourned to the next succeeding term."

It is a familiar principle of law that, during the interim between the periods when courts are allowed to sit, said courts have no judicial power, and any acts of a judicial nature, except such as may be specially authorized by statute, done in vacation, are absolutely void.—*Garlick v. Dunn*, 42 Ala. 409. Under a previous statute, which made it the duty of the sheriff, at 3 o'clock on the third day, the judge not having appeared, "to adjourn all suits," etc., to the next term, and of the clerk to enter a continuance in all suits, etc., proceedings were had, after the adjournment, in accordance with the statute, and our court held that the decree rendered "was made at a time when, from the adjournment of the court, there was no authority for the chancellor to act, and that it is therefore void"; that the act was not judicial, and could not be validated by estoppel or waiver.—*Cullman v. Casey & Co.*, 1 Ala. 351, 355. Our present statute does not require any act of the sheriff or clerk to adjourn the court; but the court stands adjourned by operation of law, whenever the time prescribed is reached, without the appearance of the judge. Consequently, at the time the motion for a new trial was granted, there was no authority of law for holding said court, and said action was void.

So the question arises as to the equity of the bill: Counsel for appellee has made an able and exhaustive argument on the right of the court of chancery to use its injunctive power for the purpose of forcing the appellant to submit to a new trial in this case. It is undoubtedly true that, from the early history of the courts of chancery in England, it was acknowledged that under certain circumstances it could virtually grant new trials at law, by operating on the party to the suit, and not on the law courts, requiring the party to submit to a new trial at law or be enjoined from enforcing his judgment. Mr. Pomeroy says that, when a judgment had been "obtained by fraud, mistake, or accident," the injunction could be granted, "and the injunction \* \* \* was a mere incident to the broader relief, which set

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aside the judgment and granted a rehearing of the controversy in the court of chancery." And he goes on to say that "the original occasion for this special jurisdiction has disappeared, as in England and most of the American states, either through statutes or through judicial action, the courts of law have acquired and constantly exercise full powers to grant new trials, whenever, from the wrongful acts or omissions of the successful party, or from accident or the mistake of the other party, or from error or misconduct of the judge or the jury, there has been a failure of justice." His general conclusion is that "a court of equity, in general, no longer assumes control over a legal judgment, for the purpose of a new trial or any similar relief."—3 Pomeroy's Eq. Jur. § 1365. Chancellor Kent also says that "anciently courts of equity exercised a familiar jurisdiction over trials at law, and compelled the successful party to submit to a new trial or to be perpetually enjoined from proceeding on his verdict. This relief was not granted, unless the application was founded upon some clear case of fraud, or injustice, or upon newly discovered evidence, which could not possibly have been made use of upon the first trial. But this practice has long since gone out of use, and such jurisdiction is rarely exercised in modern times, because courts of law are now in the competent and liberal exercise of the power of granting new trials." The learned chancellor goes on to state that it is proper for a chancery court to exercise the power in question in a "case in which the court of law has no power to award a new trial upon the merits."—*Floyd v. Jayne*, 6 Johns. Ch. (N. Y.) 479, 482. According to Judge Story, a court of equity is authorized to interfere by injunction with judgments of a court of law only on proof of facts which show it to be against conscience to execute such judgment, of which the injured party could not have availed himself, or was prevented therefrom by fraud or accident unmixed with negligence, and he states such bills are usually called bills for a new trial; but, as remarked by Lord Redesdale, "bills of this description have not of late years been much countenanced."—2 Story's Eq. Jur. (10th Ed.) §§ 883b, 886. Again he says: "Although

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some of the earlier decisions look almost like granting new trials in equity, \* \* \* the recent and better considered cases will justify no such proposition. The new trial is never granted in terms. There can be, in no such case, anything like another trial in the court of law. The case is effectually ended there." But he goes on to state that "where there was a distinct and decided fraud in the proceedings by which the judgment at law was obtained," also where the defendant, through accident or mistake, without fault, etc., fails to present his defense, the court will examine the case upon its merits, and may enjoin the party from pursuing his judgment, or a part of it, or may fix some conditions.—2 Story's Eq. Jur. (10th Ed.) § 1574, and note.

These and other authorities are clear to the point that in taking such action the equity court does not presume to act on the law court itself, but only on the party; and, that being the case, it seems to be a serious question how the equity court could make its decree effective. As stated by Judge Story, "the case is effectually ended" in the law court. Said court has no power to reopen the case at a subsequent term; and how, then, can an injunction against the party confer upon the law court the power to do that which it had no power to do before, to wit, to reopen a case, which had been finally disposed of at a previous term, and retry it? If, as some of the cases intimate, the chancery court should take to itself the trial of the case, although it might submit the issue of fact to a jury, yet under our statutes this is not a matter of right, but one which addresses itself to the unrevisable discretion of the chancellor. No question of law can be reserved by bill of exceptions, the action of the jury is merely for the information of the chancellor, and not conclusive on his conscience or judgment, and in many respects, the trial is unlike the jury trial at law that it would seem a court of chancery should, at least, demand strict conformity to the requirements of the law before interfering with the judgment of the law court.—*Matthews v. Forniss*, 91 Ala. 157, 163, 8 South. 661; *Marshall v. Croom*, 60 Ala. 121, 125; *Anonymous*, 35 Ala. 226, 229; *Alexander v. Alexander*, 5 Ala. 517, 518; *Adams v. Munter*, 74 Ala. 338,

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341. However that may be, it is clear that the appellee (complainant in the bill) has not brought itself within the terms even of the ancient authorities recognized by these venerable jurists.

But it must be acknowledged that this ancient doctrine has been revived in some of the modern decisions, and some of them, as contended by counsel for the appellee, have granted the relief in cases not covered by the principles in the earlier cases. The case of *Jones v. Com. Bank*, 5 How. (Miss.) 43, 35 Am. Dec. 419, referred to by counsel for appellee, was a case in which, as a matter of fact, the defendant had not been served with process and really had no notice of the suit. The case of *McNaughton v. Partridge*, 11 Ohio, 223, 38 Am. Dec. 731, and other similar decisions, have for their basis the opinion of Chief Justice Marshall in *Hunt's Adm'r v. Rousmanier*, 8 Wheat. (U. S.) 174, 212, 5 L. Ed. 589 et seq., the reason of which seems to be that the parties, not knowing their respective legal rights, nor the effect of the instrument which they executed, have been relieved in equity (by reforming the instrument or otherwise) on the ground that the instrument does not really express what they intended. Without expressing any opinion as to these cases, we think that they are not applicable to the case now under consideration, and certainly do not establish the doctrine that a party may obtain relief, in the nature of a new trial, because of his ignorance as to the validity of certain proceedings purporting to have been had in court subsequent to the trial of the case which he seeks to open up for a new trial.

The case of *K. & A. V. Ry. v. Fitzhugh*, 61 Ark. 341, 33 S. W. 960, 54 Am. St. Rep. 211, was a case in which, after the trial and before the time limited for signing a bill of exceptions, the judge of the trial court died; and, while the court held that in that case the facts were not sufficient to warrant the interference of the court in equity, yet the court held that if the facts had shown "an unjust and inequitable judgment," and that the party had lost his right to appeal "by unavoidable accident, fraud, or mistake," the court would compel the successful party to submit to a new trial at law or be restrained by injunction. In the case by the same

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court of *Little Rock & Ft. Smith Ry. v. Wells*, 33 S. W. 208, 30 L. R. A. 560, 54 Am. St. Rep. 216, the same principle is stated, and relief was granted, because there was no evidence to sustain the verdict, and the defendant's right of appeal "was cut off by an inevitable accident," to wit, the death of the judge. To this case there is added a long and able note by Judge Freeman, in which he cites a number of authorities, and, among other things, says: It is "a general rule of equity jurisprudence that a court of equity will not undertake to try and determine the precise question which has been determined at law; \* \* \* that, even in a case of alleged fraud, equity cannot assume jurisdiction where the fraud is not extrinsic and can only be ascertained by a retrial of the issue which has already been tried and determined."—Page 220, 54 Am. St. Rep. He goes on to show that the authority of the court of equity is not revisory, but that it interposes only when the party has not been able to present his cause of defense, because the court was not competent to hear it, or grant relief, or he was prevented by fraud, accident, or mistake, or other sufficient equitable ground, or else it appears that the judgment has become inequitable, "owing to circumstances occurring after its rendition," etc.—Page 221, 54 Am. St. Rep. He states, also, that "it is universally conceded that a court of equity will not interfere on the ground that in its decision the court of law or other judicial tribunal whose judgment is sought to be enjoined committed error, whether of law or fact."—Page 230, 54 Am. St. Rep. He states, also, that, when equity does require the successful party to submit to a new trial, said trial does not take place in the original action at law, but the chancery court orders the issues "tried as other issues out of chancery are tried."—Page 261, 54 Am. St. Rep.

There is no hint in this long note of a court of chancery going beyond the long-recognized grounds of fraud, accident, and mistake, and granting the relief because of the misapprehension of the party as to the law, except that he alludes to the case of *Cobbs v. Coleman*, 14 Tex. 594, referred to in the brief of appellee (and which

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will hereafter be further noticed), and remarks: "Doubtless it is the better policy to encourage all citizens to respect statutes until their constitutional validity has been judicially declared, and therefore we can but lightly condemn the court for relieving a party who has lost some right by his reliance upon a statute subsequently declared to be invalid. In all other cases it seems to be well established that a court of equity will never interpose to enjoin a judgment on the ground of a mistake or ignorance of the law."—Page 241, 54 Am. St. Rep. The same author, in an extended note on the maxim, "Ignorantia legis non excusat," says: "If ignorance of law could be admitted, in judicial proceedings, as a ground of complaint or of defense, courts would be involved and perplexed with questions incapable of any just solution, and embarrassed by inquiries almost interminable, until the administration of justice would become, in effect, impracticable." And he finally sums up the four principal exceptions to the rule that no relief can be obtained against a mistake of law as follows: (1) Where there is a marked disparity in the position and intelligence of the two parties, with the result that on the one side undue influence is exercised, while on the other, undue confidence is reposed; (2) where one, through mistake as to his legal rights, acknowledges himself under an obligation which the law will not impose; (3) where it is perfectly evident that the only consideration of a contract was a mistake as to the legal rights and obligations of the parties; and (4) where there is a mistake of law on both sides, owing to which the objects of the parties cannot be attained.—Note to *Ala. & V. Ry. v. Jones*, 55 Am. St. Rep. 497, 503.

It is true that the cases of *Miller v. Hall*, 12 Tex. 556, and *Cobbs v. Coleman*, 14 Tex. 594, are directly to the point in favor of the contention of the appellee, and in the opinion in the last-named case it is said: "Though knowledge of the law, statute and common, may be presumed, yet it would be straining the presumption quite too far to hold that every person is a constitutional lawyer and \* \* \* capable of deciding questions between constitutional provisions and legislative enactments." We



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are unable to see any distinction in principle between a mistake as to the constitutionality of an act of the Legislature and a mistake as to any other principle of law. It is true that all men are not constitutional lawyers, neither are they more versed in other legal questions, which are often fully as abstruse and difficult of solution as those depending on a construction of the Constitution. As Mr. Pomeroy says: "The presumption that every person knows the law must necessarily extend to all rules of law alike. To permit a distinction between rules said to be clear and those claimed to be doubtful would at once open the door for all the evils in the administration of justice which the presumption itself is intended to exclude."—2 Pomeroy's Eq. Jur. p. 310, § 846. The case of *Snell v. Insurance Co.*, 98 U. S. 85, 25 L. Ed. 52, was decided distinctly on the ground that Keith relied upon the representations of the agent of the insurance company, who had large experience and a greater knowledge than he.—Page 91, 98 U. S. (25 L. Ed. 52). It may be, as stated by the learned justice in that case, that "in such cases \* \* \* equity will lay hold of any additional circumstances, fully established, which will justify its interposition to prevent marked injustice."—Pages 91, 92, 98 U. S. (25 L. Ed. 52). Or, as said: "While recognizing the rule, the courts are ready and even astute to seize upon any element of fact as sufficient, in connection with a mistake of law, to justify the granting of relief.—16 Cyc. 74.

In our own state, the case of *Hardigree v. Mitchum*, 51 Ala. 151, expresses in strong language the adherence of the court to the principle that ignorance of the law excuses no one, and states that there are cases where it is not rigidly enforced, but the principle decided is simply that which is recognized by this and other courts—that, after a statute has received judicial construction, the construction becomes a part of the statute, so that rights acquired thereunder, by contracts relying thereon, cannot be annulled by a subsequent decision of the same court reversing the former decision.—*Farrior v. New England Mortgage Security Co.*, 92 Ala. 176, 9 South. 532, 12 L. R. A. 856. This court, many years ago, declared that the cases in which the court would

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grant relief against a mistake of law were only where the "mistake was so gross and palpable as to superinduce the belief that some undue advantage was taken of the party, owing either to his imbecility of mind or the exercise of improper influence."—*Haden v. Ware*, 15 Ala. 149, 159. In the language of this court, speaking through Judge Stone, in another case: "This case cannot be brought within any of the rules for relief against judgments on the ground of surprise, accident, mistake, or fraud. If we were, on account of the hardships of this case, to stretch principle in the attempt to afford a remedy, it is impossible even to conjecture the distance from ascertained landmarks to which such deflection would lead us."—*Baker, Lawler & Co. v. Pool*, 56 Ala. 14, 18.

There is no equity in the bill. Consequently the decree of the chancellor is reversed, and a decree will be here rendered dismissing the bill and dissolving the injunction.

Reversed and rendered.

TYSON, C. J., and HARALSON and ANDERSON, JJ., concur.

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### *Bill to Quiet Title.*

(Decided Feb. 7th, 1907. 43 So. Rep. 13.)

1. *Frauds, Statute of; Contracts for Sale of Land; Part Performance; Effect.*—An oral contract for the sale of real estate is not violative of Section 2152, Code 1896, where the purchaser went into possession and subsequently paid the purchase price, or where he paid the purchase price and subsequently went into possession.
2. *Vendor and Purchaser; Bona Fide Purchaser; Notice; Possession as Notice.*—B. purchased real estate under a parol contract and paid the purchase price, the vendor agreeing to execute a deed

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and directed the purchaser to take possession, which he did on the day following. The day the purchase money was paid, the vendor received a conveyance from his vendor to the land. The purchaser continued in possession of the premises under his contract and while in possession his vendor conveyed the land to a third person. Held, the last conveyance was void as against the purchaser and his possession under the oral contract was notice to the other purchaser.

3. *Equity; Pleading; Bill; Allegation of Age.*—A bill is not demurrable for failure to state the age of the parties thereto, unless it shows the incapacity of the parties to sue or be sued.
4. *Same; Parties; Incapacity; Pleading.*—Where the complainant is incapacitated from suing, unless it appears on the face of the bill, it must be raised by plea.
5. *Quieting Title; Venue; Pleading.*—Though the bill does not allege the residence of parties, the allegations that the premises in controversy is in the county in which the suit is brought is sufficient to give the court jurisdiction, under section 676, Code 1896.
6. *Same.*—Where the complainant is a resident of the county and the defendant enters an unconditional appearance, it is immaterial that the bill fails to allege the residence of the parties.

APPEAL from Jefferson Chancery Court.

Heard before Hon. ALFRED BENNERS.

Bill to quiet title by Washintgon Poole against the City Loan & Banking Company. From a decree for complainant, defendant appeals.

Washington Poole filed his bill to quiet title to certain lots in the city of Birmingham, alleging that at a certain time one Bowman sold him the lots in question; that he paid the purchase money for the same, \$300, and was put in possession of the property the next day, and had remained therein, in open, notorious possession, since; that Bowman promised to make him a deed to the same at once, but had never done so; that soon after he made the purchase, but while he was in possession of the property, Bowman made a mortgage on it to one Prude, the president of the defendant loan company, who afterwards transferred the mortgage to the respondent loan company. He prays that the title be quieted. Demurrers were filed to the bill as follows: "No jurisdictional facts are set out as to the identity, age, or residence of respondent. It is too indefinite, in that it fails to show

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the character of the incumbrance or conveyance alleged to affect the title to said lands. It fails to allege that said John Bowman was vested with such a title to said lands that he could convey the same to complainant at the time of his alleged sale to complainant. It fails to show that the respondent herein had any notice of the said alleged sale by said Bowman to complainant at the time of the sale to respondent. It fails to allege that the said Bowman executed any conveyance, or any other instrument in writing sufficient to convey title, of said lands to complainant prior to the execution of his said conveyance to respondent. It fails to allege that there was any record or notice of said sale by said Bowman to complainant of said land filed or recorded according to law. It fails to allege the date of said alleged sale by said Bowman of said land to complainant. It fails to show facts of the alleged transaction upon which it bases the said alleged sale by said Bowman to complainant of said lands. It sets up a conclusion of complainant that there was a sale of said lands, without stating any fact, or the character of the writing or conveyance, if any, upon which it bases its statement of the sale by the said Bowman to the complainant of said land, or that said complainant was put in possession of said land contemporaneously with the payment of the alleged purchase money." These demurrers were overruled, whereupon respondent filed his answer, denying the allegations of the bill, and alleged its ownership by virtue of the deed executed to it by John W. Prude and recorded in the office of the judge of probate; also by way of plea set up the statute of frauds. The evidence tended to show that on the 16th day of December, 1903, complainant gave Bowman a check on the First National Bank for the sum of \$300, which Bowman cashed, and that the same was purchase money on the lots; that they met by agreement for the purpose of purchasing the lots; that Bowman said to complainant he would make him a deed to the lot at once, and directed him to go and take possession of the same; that on the next day complainant moved into the house, and has since occupied it with his family; and that the house was on the lots described in the bill. The evidence tended, further, to show that

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on the afternoon of December 16, 1903, Messrs. Edwards and Ray and their wives executed a conveyance to said Bowman to the lots in question. On the 9th day of August, 1904, Bowman executed his deed to these lots to J. W. Prude, and on December 7, 1904, Prude conveyed them to this appellant.

W. T. WARD, and Z. T. RUDOLPH, for appellant.—The bill was demurrable as it fails to show that his possession and purchase were concurrent acts.—*Heflin v. Milton*, 69 Ala. 354. The bill was patently bad in failing to allege the residence, age, etc., of the parties.—Storey on Equity Pleading, § 26; 1 Daniel's Chancery Pleading and Practice; *Liddell & Co. v. Carson*, 122 Ala. 518. The decree is manifestly erroneous.—*Robinson v. Quinton*, 51 Ala. 539; *Abbet v. Page*, 92 Ala. 571. A vendor cannot be compelled to convey when he has no title.—*Fitzpatrick v. Featherstone*, 3 Ala. 40; 26 Ency. of Law (2d Ed.) 40. No estoppel can be pleaded to an invalid contract.—*Clanton v. Scruggs*, 95 Ala. 278; 135 Ala. 637.

W. S. LEWIS, and JAMES M. RUSSELL, for appellee.—Possession of land by one claiming or holding under an equity in the land is constructive notice to all the world.—*Anthe v. Heide*, 85 Ala. 236. Possession under a contract of purchase is sufficient to put the mortgagee under inquiry as to the title of the person in possession and to charge him with notice of the equities binding vendor.—*Reynolds v. Kirke*, 105 Ala. 446. The possession of land under a valid title though unrecorded is notice to all the world.—*Butler v. Thweatt*, 119 Ala. 225. A conveyance of land which is at the time in actual occupancy of the third person holding adversely to the grantor is void as against such adverse holding though the holding is without color of title.—*Sharpe v. Robinson*, 76 Ala. 343; *Pearson v. King*, 99 Ala. 127; *Davis v. Curry*, 85 Ala. 133.

ANDERSON, J.—The main point insisted upon by the appellant in this case is that its title should prevail over the claim of the appellee, because appellee's purchase of the lots in question was within the fifth sub-

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division of the statute of frauds.—Section 2152 of the Code of 1896. The only parol purchase excepted from the influence of this statute is that “the purchase money, or a portion thereof be paid and the purchaser be put into the possession of the land by the seller.” It is true that both of these acts must concur to save the purchase from the influence of the statute of frauds.—*Heflin v. Milton*, 69 Ala. 354. They need not be contemporaneous, however. If the purchaser is put in possession and subsequently pays the purchase-money, or a part thereof, or if he pays the purchase-money, and is subsequently put into possession, the transaction is beyond the influence of the statute of frauds.—*L. & N. R. R. Co. v. Philyaw*, 94 Ala. 463, 10 South. 83; *Powell v. Higley*, 90 Ala. 103, 7 South. 440.

The complainant met John Bowman in Birmingham as per appointment on the morning of December 16, 1903, and paid him the purchase price of the lots, \$300, and was then instructed by Bowman to take possession, which he did the next day, by moving into the house, where he has resided ever since, and where he was residing when the respondent's grantor, Prude, got both his mortgage and deed from Bowman. Nor does it matter that Bowman did not get his deed from Edwards and others until the afternoon of December 16th, the day the complainant paid him the purchase money. He had the legal title to the lots before the concurrence of the two acts essential to validate the complainant's purchase from him, and all of which occurred before the respondent or its vendor, Prude, acquired any claim or right to the land. The complainant being in the adverse possession of the land under a valid contract of purchase, when Bowman executed the deed and mortgage to Prude, the respondent's vendor, and when Prude conveyed to it, they were all void as to him.—*Pearson v. King*, 99 Ala. 127, 10 South. 919; *Davis v. Curry*, 85 Ala. 133, 4 South. 734. So, too, is possession of land under a contract of purchase sufficient to put a purchaser on notice.—*Anthe v. Heide*, 85 Ala. 236, 4 South. 380; *Reynolds v. Kirk*, 105 Ala. 446, 17 South. 95.

It is also insisted by counsel for appellant that the first ground of the demurrer should have been sustained,

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because the bill fails to aver the age and residence of the parties. It is true that the better practice is to make these averments; but all parties are presumed to be sui juris, and the bill is not demurrable for a failure to state the age, except when it shows the incapacity of the parties to sue or be sued.—*Liddell v. Carson*, 122 Ala. 518, 26 South. 133. Moreover, the respondent is a corporation, and, if the complainant was incapacitated from suing, the defect should have been raised by plea, but which would have amounted to nothing in the case at bar, as the undisputed evidence showed him to be over 40 years of age. It is also the better practice to aver the residence of the parties, and it is sometimes necessary to do so in order to show jurisdiction; but in the case at bar it was unnecessary, as the averment that the land, the subject-matter of the suit, was located in Jefferson county, was sufficient.—Section 676 of the Code of 1896. The other object to be obtained by averring the residence of the parties is to expedite and designate service of process, and to secure cost in case the complainant is a nonresident. In the case at bar the complainant is a resident of Jefferson county, and the respondent made an unconditional appearance, thus doing away with any need of ascertaining its residence in order to get service.

The decree of the chancellor is affirmed.

**Affirmed.**

TYSON, C. J., and DOWDELL and McCLELLAN, JJ., concur.

## **Savage, et al. v. Bradley.**

*Bill by Tenants in Common to be Let in to Redcem.*

(Decided Feb. 7th, 1907. 43 So. Rep. 20.)

1. *Tenant in Commn; Sale on Foreclosure; Redemption by Cotenants.*—While a co-tenant cannot by redeeming from a mortgage

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sale invest himself with the absolute indefeasible title to the joint property, the redemption inuring to the benefit of all, yet the other co-tenants must within a reasonable time elect to contribute if they would reinstate their title.

2. *Same; Laches of Co-tenant.*—Under ordinary circumstances, two years is a reasonable time for the exercise of the right of election to contribute and reinstate their title by co-tenant, where other co-tenants have redeemed from mortgage sale, therefore where the co-tenant did not attempt to exercise this right for nearly ten years after the redemption by the other co-tenant, such laches lost them the right to elect.
3. *Equity; Dismissal of Bill; Considering Pleadings as Amended.*—The bill will not be taken as amended so as to allege that the complainants were infant and not capable of electing to reinstate their title, as against the motion to dismiss for want of equity, since to do so would permit of amendments of new and independent facts to those stated in the bill.

#### APPEAL from Conecuh Chancery Court.

Heard before Hon. W. L. PARKS.

Bill by Samuel Bradley's heirs against L. W. Savage and others. From a decree overruling defendants' motion to dismiss for want of equity and demurrers to the bill, they appeal. This is a bill filed by several heirs of Samuel Bradley, deceased, seeking to be let in to redeem certain lands alleged to belong to them all as tenants in common. The bill alleges that Bradley died seized and possessed of certain lands, describing them, and that prior to his death he had mortgaged said lands to certain persons, who, in pursuance of the power of sale contained in the mortgage, sold them; that in 1895 certain ones of the heirs redeemed said lands from the mortgage sale, paying a sum named as redemption; that these certain heirs mortgaged the lands to one Dunn for a sum named; and that Dunn, in default of payment, sold said lands under his mortgage, and they were purchased at said sale by L. W. Savage, who in turn conveyed them to his wife. The sale is alleged to have been made in December, 1898. This bill was filed May 10, 1905.

HAMILTON & CRUMPTON, STALLWORTH & BURNETT, and JAMES A. STALLWORTH, for appellant.—So far as



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the bill seeks to remove cloud from title it is subject to the 11th ground of demurrer as the bill shows that the Savages are in exclusive possession of the land.—*Belser v. Scruggs*, 125 Ala. 336. The motion to dismiss the bill for want of equity should have been sustained. Whatever rights inured to complainants by reason of Watson's redemption of the land have been lost by the laches of the complainants and they cannot invoke a court of equity to grant them relief. They must have exercised their rights of election to benefit by the redemption with a reasonable diligence or they will be held to have repudiated the transaction and abandoned its benefits.—17 A. & E. Ency. of Law (2nd Ed.) pp. 678-679; *Britton v. Handy*, 73 Am. Dec. 497; *Lawrence v. Webster*, 44 Cal. 385; *Lee v. Fox*, 6 Dana. 177; *Mandeville v. Solomon*, 39 Cal. 133. The Alabama court has had under consideration analagous propositions and has held that the effect of redemption by one co-tenant is not to vest an absolute indefeasible title in severalty in the redemptioner. It is for the benefit of him and upon certain conditions, his co-tenants, etc., but the right of the co-tenant must be exercised with seasonable diligence if he is to benefit thereby.—*Lehman-Durr Co. v. Moore*, 93 Ala. 190; *Jones v. Matkin*, 118 Ala. 348. The time fixed as a reasonable time in which the mortgagor can elect to disaffirm a sale and redeem is two years.—*Elrod v. Smith*, 130 Ala. 215; *Mayson v. Mortgage Co.*, 124 Ala. 347; *Anton v. British American Mortgage Company*, 113 Ala. 110; *Newburn v. Bass*, 82 Ala. 622; *Alexander v. Hill*, 88 Ala. 487; *Ward v. Ward*, 108 Ala. 278; *Ezel v. Watson*, 83 Ala. 120.

JAMES F. JONES, and M. A. RABB, for appellee.—It is uncontroverted that Watson, one of the heirs of Bradley, redeemed the land from foreclosure sale under mortgage and from tax sale and that she never made any effort to enforce the lien she acquired under the mortgage by said redemption to obtain contribution. Watson, then, could not convey by mortgage any more title than she had.—*Jones v. Matkin*, 118 Ala. 341; *Pomeroy's Eq. Jur.* 1212; *Lehman-Durr Co. v. Moore*, 93 Ala.

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190. The right of redemption is not barred under the conditions existing in this case except by ten years adverse possession.

MCCLELLAN, J.—This appeal results from a decree overruling motion to dismiss for want of equity and demurrers to the bill. As a general rule a co-tenant cannot by his own act prejudice in any degree the title or right of his fellows. A joint tenancy is, as to the common property, a relation in the nature, if not in fact, of trust and confidence; and from this relation presumptions of the utmost favor to all joint owners arise, to the end that the title and rights of each in the joint estate may be preserved unimpaired.—Freeman on Co-Tenancy, §§ 166, 172; *Brittin v. Handy*, 73 Am. Dec. 497. Certainly one co-tenant may at forced sale buy the estate, and thereby in severalty become the owner; but he cannot by redeeming from mortgage sale, invest himself with an absolute, indefeasible title to the joint property. In such latter case the nonredeeming co-tenants have the right, which is only an equity, to elect within a reasonable time to contribute their proportion of the outlay made by the redemptioner in effecting the redemption and to rehabilitate their title. This act of redemption is well declared to inure to the benefit of all his co-tenants, provided within a reasonable time they elect to contribute and reinstate their title.—*Lehman-Durr & Co. v. Moore*, 93 Ala. 186, 9 South. 590; *Britten v. Handy*, 73 Am. Dec. 497, and note; 17 Ency. Law, p. 679, div. 8.

The bill here is well filed within this principle, and enjoys its favor, unless, as is contended by appellants, under their motion to dismiss for want of equity, the laches of the appellees denies them its protection. In other words, we are confronted in this case with the question: Have the complaining co-tenants asserted within a reasonable time their election to take the benefit of the statutory redemption of the common estate by their fellow? The appellants insist that two years from redemption is the reasonable limit for election by co-tenants, and invoke an analogy in the rule applied to the mortgagor's election to disaffirm, where the mort-

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gagee without contractual permission purchases at his own sale. The appellees, on the other hand, insist that ten years is the reasonable limit for such election, and offer an analogy in the statute of limitations of that period. In view of the relation involved, we are not prepared to hold that any inexorable rule can or ought to be declared, since in the very nature of the relation the conduct and condition of the co-owners might materially change the standard. However, we are of the opinion, and so hold, that in ordinary cases, such as this is, by analogy to the term fixed for the exercise of the statutory right of redemption, two years is the limit of time within which election by a co-tenant should be made in order to avail himself of the redemptioner's act. To extend the time, in ordinary cases, to ten years, would be to put within the power of a non-redeeming co-owner a wholly unreasonable option, and also fix for too long a period a condition upon title well calculated to impair confidence in its extent and duration. The status of the title and rights of the redemptioner and his fellow tenants is, in some respects, analogous to that existing when the mortgagee without stipulation to that effect in the instrument purchases at his own sale; and in ordinary cases of this character this court has many times declared two years as the reasonable time within which to disaffirm the sale. These two analogies afford, we think, firm ground upon which to found the conclusion above announced.

It appears from the bill here that the sale under the power in the mortgage was had on January 15, 1894, and that Farnham and others, strangers, became the purchasers; that on December 13, 1895, Mrs. Watson co-tenant of complainants, redeemed from the purchaser at the tax and mortgage sale, and took quitclaim conveyance from them to herself. The bill was filed May 10, 1905. Applying the two-year limitation after redemption for the election by complainants, it follows that the laches chargeable to them deprives the bill of any equity. The other relief sought is contingent upon the rights above determined, and no special consideration need be given that phase of the cause, nor is it necessary to pass upon the demurrers interposed.

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In response to the insistence of appellees that, on motion to dismiss, the bill will be taken as amended to the effect that complainants were infants incapable of electing to reinstate their title, we may refer to the following cases, which adjudge that the presumption of amendment does not authorize the retention of a bill, against motion to dismiss, when to do so amendments of new and independent facts are to be taken as already made.—*Blackburn v. Fitzgerald*, 130 Ala. 584, 30 South. 568; *Seals v. Robinson*, 75 Ala. 368; *Tait v. American Mortgage Co.*, 132 Ala. 193, 31 South. 623.

The motion to dismiss the bill for want of equity, improperly overruled below, will be here sustained, and the bill dismissed, but without prejudice.

Reversed and rendered.

TYSON, C. J., and DOWDELL and ANDERSON, JJ., concur.

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*Bill to Subject Assets of the Corporation to the Payment of its Debts.*

(Decided Feb. 7, 1907. 43 So. Rep. 360.)

1. *Appeal; Submission of Cause; Objections to Evidence.*—The cause submitted for final decree on pleadings and evidence as noted by the register, and the note of submission was silent as to any objection to evidence, and it not otherwise appearing that any objections were made on the hearing of the cause, questions raised on appeal on objection to evidence may be disregarded, as raised for the first time on appeal.
2. *Husband and Wife; Conveyance by Wife to Secure Husband's Debt; Validity.*—A conveyance by a husband and wife of the wife's separate estate to secure the debt of the husband is absolutely void and confers no title.
3. *Witnesses; Competency; Pecuniary Interest.*—The conveyance by the husband and wife of the wife's separate estate, constitut-

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ing her homestead as security for the husband's debt, being absolutely void, the legal title to the same, under section 2077, on the death of the wife, vests in the surviving minor children and cuts off any estate by curtesy in the husband; and the husband has no pecuniary interest in the result of a suit to subject the land to the debt of the grantee under the conveyance as will disqualify him as a witness.

4. *Mortgages; Absolute Deed as Mortgage; Evidence.*—The evidence must be clear and satisfactory to show that a conveyance purporting to be an absolute deed is a mortgage.
5. *Same; Sufficiency of Evidence.*—The evidence in this case is examined and held that a deed absolute in form was intended as a mortgage.
6. *Dismissal; Grounds; Absence of Necessary Parties.*—Where it appears from the answer and testimony that there was an absence of necessary parties to the bill, the bill is properly dismissed, but without prejudice.

APPEAL from Tuscaloosa County Court.

Heard before Hon. H. B. FOSTER.

Bill by B. T. Harper against the T. N. Hays Company and others. From a decree dismissing the bill, complainant appeals. Modified, and, as modified, affirmed.

B. T. Harper filed his bill against the T. N. Hays Company, a corporation, H. W. Sloan, Annie G. Hays, individually and as administratrix of T. N. Hays, and Maud Webb, as an heir of T. N. Hays. The allegations are that the T. N. Hays Company is a corporation, with the principal place of business in the town of Northport, and that it has been out of business for nearly five years; that E. F. Sloan and J. J. Neilson are the only surviving stockholders; that T. N. Hays is the other stockholder, and that he is dead; that orator has a judgment in the Tuscaloosa county court in the sum of \$300 against the said T. N. Hays Company; that execution has been issued thereon, and has been returned "No property found"; that during the lifetime of T. N. Hays he was the largest individual stockholder of the company, and its president and general manager; that about the first part of the year 1894 the respondent H. W. Sloan was largely indebted to said corporation on account, and in order to pay off and settle his said indebt-

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edness said Sloan sold to said company, or to T. N. Hays, now deceased, a tract of land which is described fully in the bill; that the legal title to the same was made to T. N. Hays in his individual capacity, and has passed into his heirs. The deed is made an exhibit to the bill, and shows that the land described in the bill was deeded by W. H. and Julia Sloan to T. N. Hays. It is alleged that Sloan is now, and has been for a number of years, and since the making of the above deed, in possession of the land therein described; that the T. N. Hays Company has been out of business for nearly five years, and has no property subject to execution; and that in equity and good conscience the property above described belonged to the said T. N. Hays Company, and ought to be subjected to the satisfaction of orator's judgment against the respondent's corporation. And to this end it is prayed that the surviving stockholders of the corporation, and H. W. Sloan, Annie Hays, individually and as executrix of T. N. Hays, deceased, and Maud Webb, an heir of said Hays, deceased, be made parties respondent to the bill; and prayer is made for a sale of the land and an application of the proceeds to the payment of orator's debt. The defendant H. W. Sloan moved to dismiss the bill for want of equity, and demurred to the bill on various grounds not necessary to be here set out. Annie G. Hays and Maud Webb denied the allegations of the bill and demanded strict proof of the same. The stockholders also denied the allegations of the bill and demanded strict proof. H. W. Sloan filed an answer, admitting he owed the T. N. Hays Company about \$800, and admitted the making of a deed, but alleged the facts to be, in respect thereto, that the account was his own, and was made for goods purchased by him to be used in the store he was then operating in Northport, but the land conveyed belonged to his wife, and made an exhibit to his answer of the deed conveying the land to his wife from another party, and denying that the land was or ever had been his property. He alleges the real facts concerning the execution of the deed to be that Hays approached him concerning the closing of the account and asked him to give him some collateral that Hays could use at a bank for the purpose of securing money, and it was agreed be-

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tween Hays, respondent's wife, and respondent that she was to execute a deed to the land, and that Hays was to hold the deed as collateral. Respondent's wife was to remain in possession of the land, and Hays was to recover the land to her at any time that the account was paid. He further alleges that his wife is dead, that her estate is insolvent, that the land conveyed was the homestead of the wife at the time of her death, and she left surviving her certain minor children named therein, and that the land really, in equity and good conscience, belonged to the children of his deceased wife, that he was in no sense a proper party to the bill, and prayed that he go hence, with his reasonable costs in this behalf expended. The other facts sufficiently appear in the opinion. On final submission of the cause the chancellor dismissed the bill, and from this decree this appeal is prosecuted.

J. J. MAYFIELD, and C. B. VERNER, for appellant.—The burden to establish by clear and satisfactory evidence that the deed from Sloan to Hayes, absolute on its face, was intended as a mortgage for the security of Sloan's debt, is upon Sloan.—*Jordan v. Garner*, 101 Ala. 414; *Adams v. Pilcher*, 92 Ala. 477; *Peagler v. Stabler*, 91 Ala. 308; *Downing v. Woodstock Co.*, 93 Ala. 262. H. W. Sloan was incompetent to testify as a witness, Hays being dead.—§ 1794, Code 1896; *Hayes v. Building & Loan Association*, 124 Ala. 663. The proposition that a deed absolute on its face may be declared a mortgage by a court of equity, does not apply and cannot be extended to third parties or strangers; especially, when they are bona fide purchasers of judgment creditors without notice of the secret equity.—*Reeves v. Brooks*, 80 Ala. 26; 2 Hermann on Estoppel, §§ 1100-1101-1113; 3 Devlin on Deeds, § 1141.

HENRY FITTS, for appellee.—On the admitted facts in this case upon the death of Mrs. Sloan no estate passed to her husband and the title vested absolutely in her minor children.—*Quinn v. Campbell*, 126 Ala. 280. The evidence clearly establishes that the sole purpose of Mrs.

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Sloan's deed was to secure the debt of her husband. The inadequacy of consideration and the fact of the continued possession of the grantor is the strongest evidence that the paper was intended as a mortgage.—*McCoy v. Gentry*, 73 Ala. 105; *Parks v. Parks*, 66 Ala. 326; *Turner v. Wilkinson*, 72 Ala. 361; *Glass v. Heironymous Bros.*, 125 Ala. 140. The conveyance of a wife's land absolute in form, but intended only as a mortgage for the husband's debt, has no force or effect as against the heirs of the wife and the rights of the creditor whose debt is so secured is limited to the curtesy estate of the husband.—*Bone v. Lansden*, 85 Ala. 562, s. c. 90 Ala. 446. Sloan had no pecuniary interest and the mere fact of relationship to one of the parties of the suit does not disqualify.—*Myers v. Myers*, 141 Ala. 343; *Haraway v. Haraway*, 136 Ala. 506; *Stevenson v. Stevenson*, 6 Tex. Civ. App. 529; *Albany Co. etc. McCarty*, 149 N. Y. 71. His testimony was contrary to the interest which is asserted to disqualify him.—*Street v. Street*, 113 Ala. 333. This alone would take him without the statute.—*Hill v. Hilton*, 80 Ala. 528. The interest which disqualifies is a direct and immediate conflict in the issue being tried.—*Hill v. Hilton*, *supra*; *Huckabee v. Abbott*, 87 Ala. 410; *Schulman v. Fitzpatrick*, 62 Ala. 571; *Manegold v. Life Ins. Co.*, 131 Ala. 182. There is nothing in the contention of appellant that the act approved Feb. 8, 1895, (Acts 1894-5, p. 1162) is unconstitutional.—*Stato v. Rogers*, 107 Ala. 444.

DOWDELL, J.—This cause was submitted in the court below by the parties for a final decree on the pleadings and evidence as noted by the register, and it is from the final decree rendered on this submission and hearing that the present appeal is prosecuted. The note of submission made by the register is silent as to any objection or objections by either party to the evidence, or any part of the evidence, offered, and it does not otherwise appear that any objections to the evidence were made to the court on the hearing of the cause. For this reason we might now disregard questions here raised on objections to evidence as being now raised for the first time.



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The undisputed evidence in the case shows that the 30 acres of land sought to be subjected by the complainant was the separate estate of Mrs. Julia Sloan, the legal title to which resided in her. If the conveyance, which purported on its face to be an absolute deed from H. W. Sloan and Julia Sloan to T. N. Hays, conveying the 30 acres in question, was intended by the parties to be and operate as a mortgage and to secure the debt of the husband, H. W. Sloan, it was absolutely void as a security by the wife for the husband's debt, and therefore conveyed no title. The evidence without dispute further shows that the 30 acres formed a part of the wife's homestead, upon which she and her husband at the time resided, and which in area was less than 160 acres and in value less than \$2,000. If the conveyance was void for the reason that it was made on the wife's land to secure a debt of the husband, then at the death of Mrs. Julia Sloan the legal title to the homestead vested in the minor children surviving her, cutting off any estate by curtesy to the husband.—Code 1896, § 2077; *Quinn v. Campbell*, 126 Ala. 280, 28 South. 676. This being true, H. W. Sloan had no such pecuniary interest in the result of the suit as would disqualify him to testify as a witness in the case.

If E. T. Sloan, by reason of being a nominal stockholder of one share in the T. N. Hays Company, could be said to be a person having a pecuniary interest in the result of the suit, affecting his competency as a witness, which we do not decide, the fact remains that he was called to testify by the persons to whom his interest was opposed. It is a well-settled rule that, when a conveyance which purports on its face to be an absolute deed is sought to be shown to be a mortgage, it must be done by evidence that is clear and satisfactory.—*Jordan v. Garner*, 101 Ala. 414, 13 South. 678; *Adams v. Pilcher*, 92 Ala. 477, 8 South. 757; *Peagler v. Stabler*, 91 Ala. 308, 9 South. 157.

We think the evidence in this case very clearly and satisfactorily shows that the deed in question was intended to operate as a mortgage. All the circumstantial facts in the case are corroborative of the testimony of the witness along this line. It appears, from the an-

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swer of the respondent Sloan and the testimony on which the cause was submitted for final decree, that the children, heirs at law of Mrs. Sloan, deceased, were necessary parties to the bill, and they were not made parties. This was sufficient to justify the chancellor in dismissing the bill; but it should have been dismissed without prejudice, and to that extent the decree will be here modified, and, as modified, will be affirmed.

TYSON, C. J., and ANDERSON and McCLELLAN, JJ., concur.

## Spears v. Taylor, et al.

### *Bill to Enforce Vendor's Lien.*

(Decided Jan. 23rd, 1907. 42 So. Rep. 1016.)

1. *Vendor and Purchaser; Vendor's Lien; Effect of Taking Collateral Security.*—Where one sells land and takes personal collateral security as a pledge or mortgage, generally no lien for the purchase money rests on the land.
2. *Same; Waiver; Burden of Proof.*—Where a vendor's lien has been reserved on the land, the party asserting that such lien has been waived has the burden of proving it; but where a distinct security sufficient to operate as a waiver has been taken and this is shown, the burden is shifted to the vendor to prove a reservation of the lien.
3. *Same; Evidence.*—The vendor sold the land and took a note for part of the purchase price which described the land by government subdivisions and recited that it was given in part payment of the land. The note was signed by C. as surety. He testified that he agreed to sign the note because a lien was reserved and so stated to the vendor and purchaser, and also so stated to the purchaser's vendee. Held, not to show a waiver of the vendor's lien for the balance of the purchase money.
4. *Appeal; Equity; Chancellor's Decree; Presumptions.*—No presumptions are indulged as to the correctness of the chancellor's decree on appeal, and this court must reach its own conclusions without regard to such decree.

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APPEAL from Dale Chancery Court.

Heard before Hon. W. L. PARKS.

Bill by S. A. Spears against R. I. Taylor and others. From a decree in favor of defendants, plaintiff appeals.

This was a bill to enforce a vendor's lien. The appellant filed the bill against the appellee and against H. H. Dowling & Co., who are alleged to have a mortgage on the land. The defense was that the lien was waived by taking personal security on the note for the deferred payment. Dowling's defense was a want of notice and innocent purchaser without notice. The facts tend to show that the appellant sold appellee Taylor a lot of land, for which he received a large sum of money and a note for \$100, describing the land and stating that it was a vendor's lien note. The surety signed it. The surety testifies that he would not have signed, but for the fact that it was a purchase-money note, and that he so informed both parties. He also testified that he told Dowling & Co. of the fact that it was a purchase-money note, and that he signed it as such. The chancellor refused to enforce the lien, held the seller to have waived it, and that Dowling & Co. were innocent purchasers for value without notice. From this decree this appeal is prosecuted.

H. L. MARTIN, for appellant.—The evidence shows that it was the intention of the parties that the vendor's lien was not to be waived by the taking of personal securities.—*Teddow v. Steele*, 70 Ala. 347; 4 Mayf. Dig. pp. 1104, 1105.

H. B. STEAGALL, for appellee.—No brief came to the reporter.

DENSON, J.—This is a bill filed by Mrs. S. A. Spears against R. I. Taylor, H. H. Dowling & Co., and H. H. Dowling and Mrs. Neal Dowling, individuals composing the firm of H. H. Dowling & Co. The purpose of the bill is to enforce a vendor's lien on the lands described in the bill. The critical question for determination is: Did the complainant, under the circumstances accom-

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panying the sale, waive her vendor's lien by taking personal security to secure the deferred payment?

The undisputed facts are that on August 30, 1904, the complainant, through her husband, who was her general agent, sold the lands to R. I. Taylor for the sum of \$1,100, and the complainant executed to Taylor an absolute deed to the lands. Taylor paid \$1,000 of the purchase price in cash, and complainant accepted his note for \$100 with W. E. Clements as surety for the balance, due November 15, 1904. The note recites that it was given in part payment of the lands, and describes the land. The first case involving this question that came before this court was decided in 1842.—*Foster v. Trustees, etc.*, 3 Ala. 302. In that case the court, speaking through Ormond, J., after reviewing the English and American cases, concluded with this summary: "It cannot, therefore, we think, admit of serious doubt that the law on this interesting subject ought to be considered as settled, at least in the United States, that, where a vendor of land executes a conveyance and takes personal collateral security as a pledge or mortgage, no lien exists on the land itself. So far as the presumed lien on the land for the purchase money rests for support on the supposed intention of the parties, it may be confidently stated that in this state it rarely, if ever, exists in the contemplation of the parties where a conveyance of the land is made." The doctrine as stated in that case has never been departed from by the court, as will be seen by reading numerous cases decided since its promulgation.—*Walker v. Carroll*, 65 Ala. 61; *Walker v. Struve*, 70 Ala. 167; *Donegan v. Struve*, 70 Ala. 437; *Donegan v. Hentz*, 70 Ala. 437; *Tedder v. Steele*, 70 Ala. 347; *Williams v. McCarty*, 74 Ala. 295; *Carroll v. Shapard*, 78 Ala. 358; *Chapman v. Peebles*, 84 Ala. 283, 4 South. 273; *Jackson v. Stanley*, 87 Ala. 270, 6 South. 193; *Hubbard v. Buck*, 98 Ala. 440, 13 South. 364.

But the question of waiver, it has been held, is one of intention, and the burden of proof is on the vendee to establish in the particular case that the lien has been intentionally displaced, or waived, by consent of the parties, express or implied. "If it remain in doubt, then the lien must be held to attach."—*Tedder v. Steele*,

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70 Ala. 347, 351, citing 2 Story's Eq. Jur. § 1224; 1 Perry on Trusts, § 236. In respect to the burden of proof it has also been held that "the burden of proof is, in the first instance, on the party asserting a waiver of the lien; but, when it is shown that a distinct or independent security, sufficient to operate as a waiver, has been taken and accepted, the onus is shifted on the vendor to prove an understanding or agreement for its reservation."—*Jackson v. Stanley*, 87 Ala. 270, 6 South. 193. While it is true that the note upon which the vendor's lien is sought to be enforced in the case at bar has upon it a personal surety, which fact evidences the waiver of the lien, it is also true that the note contains these recitals: "It is understood that this note is given in part payment on the S. A. Spears land, better known as the 'W. M. Sheppard Place.'" Immediately following the recitals quoted is a description of the land by the government subdivisions. In this state of the case the rule is that such recitals are cogent facts indicating an intention not to waive or abandon the vendor's lien, but to retain it—so cogent, and the presumption so strong, as to overcome and rebut the weaker presumption of waiver arising from the taking of personal security on the note for the purchase money.—*Tedder v. Steele*, 70 Ala. 347; *Chapman v. Peebles*, 84 Ala. 283, 4 South. 273; *Hammett v. Stricklin*, 99 Ala. 616, 13 South. 573; *Graylee v. Lamkin*, 120 Ala. 210, 24 South. 756; *Hood v. Hammond*, 128 Ala. 569, 30 South. 540, 86 Am. St. Rep. 159. So it would seem that in the instant case the burden of proof remains with the vendee to establish that the lien has been intentionally waived.—*Tedder v. Steele*, *supra*.

The chancellor held that the complainant was not entitled to relief, thus necessarily holding that the lien was intentionally waived. No presumption of correctness can be indulged in favor of the chancellor's decree; but we must reach our conclusion without regard to it. The oral evidence has been carefully considered, in connection with the documentary, and we are unable to concur with the chancellor. Our conclusion is that the preponderance of the evidence shows that the lien was not waived, and that respondents Dowling & Co. took

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their mortgage with notice of the lien. It follows that the decree of the chancery court must be reversed, and a decree will be here rendered granting the relief prayed for.

Reversed and rendered.

TYSON, C. J., and HARALSON and SIMPSON, JJ., concur.

## Gillespie, et al. v. Gillespie.

### *Bill for Sale of Land for Division.*

(Decided Feb. 6th, 1907. 43 So. Rep. 12.)

1. *Adverse Possession; Character of Possession; By Donee.*—One holding land under a parol gift is a tenant at will, until there has been such adverse possession by him that, if continued for the statutory period will work a divestiture of the donor's title.
2. *Same; Claim of Right.*—To be adverse to the donor, the possession of land by one who enters under a parol gift must be accompanied by a claim of right and hostility to the donor's title.
3. *Same; Evidence; Sufficiency.*—The evidence in this case considered and held insufficient to show that the possession of the donee was adverse to the donor's title.

APPEAL from Jefferson Chancery Court.

Heard before Hon. ALFRED BENNERS.

Bill by James M. Gillespie, administrator of the estate of John G. Gillespie, deceased, against James M. Gillespie, Jr., and others. From a judgment for plaintiff, defendants appeal. Affirmed.

This was a bill filed by the administrator of John G. Gillespie against a number of respondents, seeking to sell for division certain lands mentioned in the bill. The allegations are that John Gillespie was a resident of said county and died before the filing of the bill, and that his wife, Martha C. Gillespie, was dead, and that both died without issue. The heirs are alleged to be the

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brothers and sisters of the deceased, and the children of such brothers and sisters as are dead, all of whom, together with their interest in the land, are set out in the bill. It is further alleged that owing to the number of heirs and the smallness of some of the shares, together with the fact that about 75 acres of land is improved and the balance unimproved, and also the further fact that deceased had conveyed the mineral interest in part of said lands, an equitable division of the same cannot be made without sale, and that Mary Miller and others of said heirs desire the same to be sold. It is also alleged that the personal assets of the estate are more than sufficient to pay the claims and debts against the said estate and the cost of administration. The respondent James Gillespie admitted the death of the owner of the land, but asserted that before his death, and for more than ten years before his death, decedent had given him a certain 70 acres of said land, and that he had gone upon it and continued in adverse possession of the same for more than 10 years next before the filing of the bill, and that he had occupied the same continuously as his own. The tendencies of the evidence are set out in the opinion. The chancellor decreed a sale of the land and the other relief prayed for, and also decreed that the respondent James Gillespie was entitled to a lien upon the 70 acres of land claimed by him for the present value of all improvements, betterments, and enhancements erected by him.

GEORGE D. HUDDLESTON, and JOHN T. STRANGE, for appellant.—The act of the uncle in giving the land to the nephew and inviting him to improve it estopped the uncle and complainant from asserting any claim or ownership in the land or from denying the defendant's title thereto.—*A. G. S. R. R. Co. v. S. & N. R. R. Co.*, 84 Ala. 570; *Cowan v. Southern Ry. Co.*, 118 Ala. 554; *Hoome v. Pollack*, 118 Ala. 617; *Hendrix v. Kelly*, 64 Ala. 388; *S. & N. R. R. Co. v. A. G. S. R. R. Co.*, 102 Ala. 236; *R. R. Co. v. Jones*, 68 Ala. 48; *Franklin v. Pollard Mill Co.*, 88 Ala. 318. The sufficiency of appellant's plea not having been questioned, and being supported by the testimony undisputedly, appellant was entitled to a decree

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on it, notwithstanding the plea did not present a defense.—*Tyson v. Decatur Land Co.*, 121 Ala. 414; *Horn v. Detroit Dry Dock Co.*, 150 U. S. 610; *Kennedy v. Cresswell*, 101 U. S. 641; *Fletcher's Eq. P. & P.* § 290.

J. G. CREWS, and JNO. W. TOMLINSON, for appellee.—A parol gift of land creates a tenancy at will and the gift may be disaffirmed or revoked at any time unless barred by the statute of limitations under adverse holdings.—*Collins v. Johnson*, 57 Ala. 306; *Boykin v. Smith*, 65 Ala. 294. Where the land is claimed under a parol gift accompanied by possession for more than ten years it requires more than the ordinary act of ownership to convert such possession into an adverse holding.—*Burrus v. Meadows*, 90 Ala. 140; *Vandiver v. Stickney*, 65 Ala. 224; *Boykin v. Smith, supra*. Where a relation exists between the owner and the party in possession by which the possession is referable to the title the holder of the title is justified in assuming that the possession is subordinate thereto and held in recognition thereof until knowledge to the contrary is brought to him.—*Trufant v. White*, 99 Ala. 526; *Baucum v. Jenkins*, 65 Ala. 259. Under the facts in this case appellant's title was not adverse and furnishes no room for the operation of the statute.—*Trufant v. White, supra*; *Boykin v. Smith, supra*. Appellant was not a competent witness to prove the gift by the deceased.—Code 1896, § 1794; *Boykin v. Smith, supra*. The declaration of appellant to third person that the land was his was of no consequence in the absence of proof that he held the land adversely to the donor and that the donor had knowledge of the adverse holding.—*Jones v. Palham*, 84 Ala. 208; *Butler v. Butler*, 133 Ala. 377.

McCLELLAN, J.—He who enters into the possession of lands under a parol gift is a tenant at will, until there has been by him such adverse possession as, if continued for the statutory period, will work divestiture of the donor's title. The possession, to merit the protection of the statutory bar, must be uninterrupted and continuous, accompanied by a claim of right to the land and hostility to the title of the donor, and without recognition thereof.—*Collins v. Johnson*, 57 Ala. 304; *Tru-*



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*fant v. White*, 99 Ala. 526, 13 South. 83; *Boykin v. Smith*, 65 Ala. 294; *Burrus v. Meadors*, 90 Ala. 140, 7 South. 469. Conceding, for the purposes of this opinion, that appellant's childless uncle by parol gift installed appellant in possession of the "Killough place," a concession of very doubtful support in this record, we do not think appellant has discharged the burden of proof assumed by him in his pleadings; and our conclusion, after a careful consideration of the legal and competent testimony offered, may be rested, on the part of alleged donor, upon his acts in and about the "Killough place," including its improvements by him, and the unvarying assessment and payment of taxes thereon, and his negotiations for a sale of the minerals underlying the land; and, on the part of the appellant, the assertions, undenied by him, to the effect that his uncle had not given him that place, thereby evincing an entire absence, in his possession, of hostility to the title of the donor, and also appellant's failure to himself return the land for taxation in his own right, affording, in connection with the other evidence, the inference that he claimed no taxable interest in the property.—*Green v. Jordan*, 83 Ala. 220, 3 South. 513, 3 Am. St. Rep. 711. Where a donor alone assesses and pays the taxes on the alleged subject of the gift for a period of nearly 20 years succeeding the time of the alleged gift is, as matter of evidence and unexplained, inconsistent with a possession by a donee that may ripen into a fee estate; and such acquiescence in the annual proclamation by a donor of his title is a fact of strong probative force that the donee's possession was in subordination to the title and in recognition of it. The decree, being in accord with this conclusion, is affirmed.

Affirmed.

cur.

TYSON, C. J., and DOWDELL and ANDERSON, JJ., con-

[City Council of Montgomery v. Reese.]

## City Council of Montgomery v. Reese.

### *Bill to Restrain Issuance of Bonds.*

(Decided Dec. 20th, 1906. 43 So. Rep. 116.)

*Statutes; Constitutional Provisions; General and Special Statutes.*

—Local Acts 1903, p. 615, is violative of Sec. 105 of the Constitution of 1901, and the issuance of refunding bonds by the city was properly had under the provisions of the general statutes, Acts 1903, p. 71.

APPEAL from Montgomery City Court.

Heard before Hon. A. D. SAYBEE.

Bill by Essie L. Reese against the city council of Montgomery and others. From a judgment overruling demurrers filed to the bill, defendants appeal. Reversed and judgment rendered sustaining the demurrers to the bill.

This was a bill filed by a resident citizen, as the owner of property and a taxpayer, to restrain the issuance of certain bonds named therein, and to declare the ordinance authorizing their issuance null and void. The ordinance is set out as an exhibit to the bill; but all that is necessary to be here set out is that it provided for the issuance of bonds to run for 30 years from the 1st day of January, 1907, bearing interest at the rate of 4 1-2 per cent. and payable semiannually. The allegations made by the bill show that the ordinance was in all respects passed as required by law. The equity of the bill is rested on the fact that the bonds were improperly issued under the general law relating to such matters, and that they carried a too high rate of interest, and that they should have been issued under a special law passed by the Legislature authorizing the city of Montgomery to refund its bonded indebtedness. The general law, approved February 26, 1903 (Gen. Acts 1903, p. 71), and the special law approved September 26, 1903 (Loc. Acts 1903, p. 615), are made exhibits to the bill. Demurrers were filed to the bill, raising the question

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as to the unconstitutionality of the special or local law. The demurrers were ruled adversely to the city.

C. P. MCINTYRE, for appellant.—In this state it is a judicial question whether the matter of a special law “is provided for by a general law.”—§ 105 of the Constitution of the State of Alabama; *Nisk v. Cargile et al.*, 138 Ala. 164; *State ex rel. v. Cooley*, 56 Minn. 540, at p. 546; *State v. Graneman*, 13 Mo. 326 at p. 331; *State v. Auslinger*, 171 Mo. 600; *Henderson v. Koenig*, 168 Mo. 356 at p. 375. It is presumed that judicial constructions of constitutional provisions adopted from other states, have also been adopted.—*People v. Coleman*, 4 Cal. 46; *Fowler v. Lamson*, 146 Ill. 472; *Cyclopedia of Law and Procedure*, Vol. 8, p. 739; *Ex parte Rountree*, 51 Ala. 42. Courts do not favor repeal of statutes by implication.—*City of Montgomery v. National B. & L. Asso.*, 108 Ala. 336. If both acts, the earlier and later, relate to the same subject, and can be reconciled, they must stand, and have a concurrent operation.—*Skelly v. Montrell St. Ry. Co.*, 67 Conn. 261; *Kallahan v. B. Osborne*, 37 Conn. 488; *The City of Norwich v. Stone*, 25 Conn. 44; *Goodman v. Jewett*, 24 Conn. 588. Acts enacted at the same session of the legislature are within the reason of the rule governing the construction of statutes in *pari materia*.—*City of Montgomery v. National Building & Loan Association*, 108 Ala. 336; *Smith v. The People*, 47 N. Y., at p. 339; *Powers v. Shepard*, 48 N. Y. 540; *State v. Clark*, 54 Mo. 216; *Commonwealth v. Huntley*, 156 Mass. 236. Repeals by implication are never favored and this is especially so with reference to acts passed at the same session of the legislature—“As they were passed at the same session of the legislature a more liberal rule of construction should be allowed against the repeal by implication.”—*Houston & Tex. C. C. Ry. Co. v. John A. Ford*, 53 Texas, 364 at p. 371; *Endlich on Interpretation of Statutes*, § 188 and § 210; 26 Am. and Eng. Ency. of Law, 736.

GUNTER & GUNTER, for appelle.—Counsel discuss the proposition involved but cite no authorities.

[City Council of Montgomery v. Reese.]

PER CURIAM.—By the act of the Legislature approved February 26, 1903 (Gen. Acts 1903, p. 71), a general law was enacted “to provide for the settlement, adjustment, and refunding of the bonded indebtedness of municipal corporations.” By the provisions of this act the municipal authorities of any city, town, or village of this state which may have outstanding a bonded indebtedness of any kind are authorized to issue bonds for an amount not exceeding the indebtedness of such corporation proposed to be refunded, in such sums and form, to run not exceeding 30 years, and to bear a rate of interest not to exceed 5 per centum per annum. On the 26th of September, 1903 (Loc. Acts 1903, p. 615), a local or special law, was passed authorizing the city of Montgomery to refund its bonded indebtedness, existing and outstanding at the date of the ratification of the Constitution of 1901, by issuing bonds therefor to bear a rate of interest not to exceed 4 per centum per annum, to run not to exceed 40 years, from the date of issue. Section 105, art. 4, of the Constitution, provides that “no special, private or local law, except a law fixing the term for holding courts, shall be enacted in any case which is provided for by general law, \* \* \* and the courts, and not the Legislature, shall judge as to whether the matter of said law is provided for by a general law. \* \* \* Nor shall the Legislature indirectly enact any such special, private or local law by the partial repeal of the general law.”

It is apparent that the subject-matter of the two acts is substantially the same; and it is equally apparent that the inhibition contained in the section of the Constitution quoted was violated by the enactment of the special or local law. It is of no consequence that the special or local act contains matter germane to the subject expressed in its title, “to authorize the city council of Montgomery to refund the bonded indebtedness of said city,” etc., which are not in the general law; for, obviously, if the insertion of such matters in a special, local, or private law would obviate the constitutional prohibition, then the prohibition could be easily circumvented and practically rendered nugatory. It is not perceivable that the framers of the Constitution intended

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the prohibition to operate only against special, local, or private laws which are in *ipsis verbis* of the general law. It follows, therefore, that we are constrained to hold the act of September 26, 1903, to be unconstitutional and void.

The decree appealed from is reversed, and one will be here rendered sustaining the demurrer to the bill.

Reversed and rendered.

## Smith v. Chapman & Co.

*Assumpsit.*

(Decided Dec. 20th, 1906. 42 So. Rep. 817.)

*Courts; Terms; Duration of Term.*—A summons was issued and served on the defendant on October 8th, returnable to the November term. The November term convened on the 7th of that month, and on Tuesday following the convening of the court, the plaintiff not having demanded trial by jury, and the defendant not appearing, a judgment by default was entered against defendant. Held, that under the terms of the act (Local Acts 1903, p. 40,) creating the county court of Geneva county, the case stood for trial and was triable on the day the judgment for default was rendered.

APPEAL from Geneva County Court.

Heard before Hon. E. F. ELLSBERRY, Special Judge.

Action by Chapman & Co., against W. H. Smith. From a judgment for plaintiffs, defendant appeals. Affirmed.

W. O. MULKEY, for appellant.—The cause was not at issue on Monday, Nov. 7, and under the rules of practice governing the county courts would not be at issue until the following term and the court erred in rendering judgment by default on Tuesday, the 8th of November.—Acts 1903, p. 537, § 3308, Code 1896.

W. R. CHAPMAN, for appellee.—No brief came to the reporter.

[Smith v. Chapman &amp; Co.]

TYSON, C. J.—Under the act establishing the court rendering the judgment from which this appeal is prosecuted, the terms of the court are required to be holden on the first Monday in each month, and “shall continue until the causes therein pending are disposed of.”—Loc. Acts 1903, p. 40. The tenth section of the act provides “that the summonses and other civil process, preceding the trial, shall be made returnable to the term of court next thereafter, unless the same are issued less than three days before such term in which event they shall be made returnable to the next succeeding term, and when the summons in any civil cause has been executed fifteen days or more before the first day of the term at which it is returnable, it shall stand for trial at such term, unless the plaintiff in bringing the suit, has demanded a jury trial, as herein provided, or unless the defendant, in filing his plea or other form of defense, has demanded a jury trial as herein provided, in either of which events the cause shall stand for trial at the next succeeding jury term. The clerk of said court shall set all civil and criminal causes for trial on such days of each term as may be designated by him,” etc. The summons in this case was issued on the 8th day of October, 1904, returnable to the November term of the court, which convened on the 7th day of that month, and was served on the defendant on the day it was issued. On Tuesday, the day following the convening of the court at the November term, the defendant not appearing, a judgment by default was entered; the plaintiff not having demanded a jury trial.

The contention against the regularity of the judgment is that the defendant had the whole of Monday, the first day of the term, within which to plead, and that the court could not continue its session on Tuesday for the purpose of trying the cause. This is clearly in contravention of the plain language of the act quoted above, as well as the spirit of it. It requires no act of the court to continue the term for disposing of causes pending therein. By the express words of the law creating the court, the term is continued for the purpose of disposing of all cases where the summons has been served 15 days or more before the first day of the term.

[Gillespie v. Campbell.]

All such cases stand for trial at that term, unless a jury trial is demanded. Of course, where the service of the summons is within 15 days of the first day of the monthly term, the cause would not stand for trial at that term. But such is not the condition of this case. The cause stood for trial, and was triable, on the day the judgment by default was rendered.

Affirmed.

HARALSON, SIMPSON, and DENSON, JJ., concur.

## Gillespie v. Campbell.

### *Assumpsit.*

(Decided Feb. 7th, 1907. 43 So. Rep. 28.)

1. *Administrator; Action Against; Complaint.*—The complaint claimed by an account stated against the administrator of a certain date; by account stated between plaintiff and decedent on the same date; for work and labor done for decedent, and averred that said claim was verified by affidavit and filed in the office of the judge of probate within twelve months of the grant of letters of administration, and that all the counts in the complaint are for one and the same cause of action. Held, sufficient, as against the objection that it fails to state for what the indebtedness was incurred; that it is indefinite as to whether the work was done for the administrator or for the decedent, and that it fails to show that the claim was filed in the probate court within twelve months of the grant of letters of administration.
2. *Same; Claim Against Decedent; Verification; Amendments.*—The omission in the verification of the claim that the sum demanded is the sum due after allowing all proper credits, is an amendable defect under section 133, Code 1896.
3. *Evidence; Best Evidence; Record of Court.*—The docket entries made by the probate court is the best evidence of the filing and docketing of the claim against the estate of the decedent.
4. *Administrators; Claims against the Estate; Evidence; Proof of Similar Transactions.*—In an action against the adminis-

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trator for work and labor done for decedent during his last illness, it was irrelevant to show what the administrator paid others for waiting on decedent during his last illness.

APPEAL from Jefferson Circuit Court.

Heard before Hon. A. A. COLEMAN.

Action by Caroline I. Campbell against James M. Gillespie, administrator. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

The first count in the complaint was for \$191, due by the administrator as such by account made by decedent on the 5th day of October, 1903. The second count was on an account stated between plaintiff and decedent on the same day. The third count was for work and labor done for decedent and his wife during his lifetime and at his request from the 1st day of March, 1903, to the 5th day of October, 1903, with the additional averment that said claim was verified by affidavit and filed in the office of the judge of probate of Jefferson county, Ala., and was for the money claimed in all the counts of this complaint, and that said claim was filed in said probate judge's office against said estate on the 24th day of August, 1904, and within 12 months from the grant of letters of administration; and plaintiff avers that all the counts of the above complaint are for one and the same cause of action. Demurrers were interposed as follows: "The first count claims for money due by account, but fails to state for what the indebtedness was incurred. The third count is indefinite as to whether the work was done for the administrator or the intestate. The third count does not allege that the work and labor was done by plaintiff during the lifetime of the intestate. The complaint does not show whether the claim was for the account stated mentioned in the second count, or for work and labor claimed in the third count. The complaint does not state that the claim filed against the estate of the decedent in the probate court was verified by affidavit. The complaint does not state that said claim filed in the probate court was filed within 12 months after letters of administration were granted. It does not appear what claim was filed in said probate court. It does not



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appear that said claim was filed in said probate court, verified by affidavit, within the time prescribed by law, describing said claim with certainty. It does not appear from the complaint by whom the said claim alleged to have been filed was verified." These demurrers being overruled, the defendant filed several pleas, not necessary to be here set out, on which issue was joined. The claim offered in evidence was verified as follows: "Before me, Jasper Satterfield, a notary public in and for said county, in said state, personally appeared Caroline I. Campbell, who, being duly sworn by me, deposes and says that the above-stated account is true and correct, and that it is past due and unpaid." Subscribed and signed by Caroline Campbell, and attested by Jasper Satterfield, notary public. Indorsed: "Filed in office this the 24th day of August, 1904, as a claim against the estate of John G. Gillespie, deceased. (Signed) J. P. Stiles, Judge of Probate." The defendant objected to the introduction of this evidence, because it was not sworn to in the manner required by law, and because the claim is not shown to have been filed and docketed by the probate judge as required by law. Upon examination of the defendant as a witness, the plaintiff asked the defendant "what he had paid Jane Rhody, his daughter, to stay with the intestate the last three months of his last illness." Objection was interposed by defendant, and was overruled by the court.

JOHN W. TOMLINSON, and J. G. CREWS, for appellant.—The claim against the estate was not properly verified.—§ 133, Code 1896. Evidence of what the administrator paid another for alleged services for the deceased is inadmissible.—*Collins v. Fowler*, 4 Ala. 647; *K. C. M. & B. R. R. Co. v. Burton*, 97 Ala. 240. The verdict not being regularly found and declared in open court, did not entitle the prevailing party to a judgment thereon.—*Jackson v. The State*, 102 Ala. 76; *Jones v. The State*, 97 Ala. 77; 28 A. & E. Ency. P. & P. p. 417. The filing and docketing of a claim against the estate must be shown by the best evidence.—*Korney v. Meyer*, 135 Ala. 141.

[Young, et al. v. Garber.]

JOHN D. STRANGE, for appellee.—There was no objection to the verdict as it was returned.—*Grace v. McKissack*, 49 Ala. 163, and authorities there cited.

DOWDELL, J.—The complaint was on the common counts. We fail to see any merit in the demurrer to the complaint as amended.

The account as filed in the probate court was not verified as required by the statute. The verification omitted the words, “after allowing all proper credits.”—Section 133, Code 1896. But by the provisions of this statute this defect or insufficiency of the verification may be cured by amendment.

In *Kornegay v. Mayer*, 135 Ala. 141, 33 South. 36, it was decided that the highest and best evidence of the filing and docketing of the claim in the probate court is the docket entries there made.

What the administrator paid some other person for waiting on the deceased during his last illness was wholly irrelevant and immaterial. It was error to admit this evidence against the objection of the defendant, and for this error the case must be reversed. As the judgment must be reversed, and the cause remanded for another trial, it is unnecessary to consider the question of the court’s receiving the verdict after the jury had been discharged by the clerk without an order of the court.

Reversed and remanded.

TYSON, C. J., and ANDERSON and McCLELLAN, JJ., concur.

## Young, et al. v. Garber.

*Assumpsit.*

(Decided Dec. 19th, 1906. 42 So. Rep. 867.)

*Money Had and Received; Obligation to Repay.*—A landlord assigned and transferred the rent note before its maturity. Af-

[Young, et al. v. Garber.]

ter the transfer of the rent note, the land was sold under execution against the landlord. The purchaser at the execution sale, without notice of the transfer of the note, collected the rent; Held, the transferee of the note was entitled to recover the rents collected by the purchaser, in an action for money had and received.

APPEAL from Hale Circuit Court.

Heard before Hon. B. M. MILLER.

Action by J. B. Garber against H. T. Young and another for money had and received. From a judgment for plaintiff, defendants appeal. Affirmed.

The case was tried upon the following agreed statement of facts: On the 19th day of December, 1900, George Washington owned a certain piece of land, which on said day he rented to Margaret Williams, for the year 1901, for 750 pounds of middling lint cotton, or its equivalent in money at 9 cents per pound, at the option of the holder of the note. That before the maturity of said note the lands belonging to George Washington were sold under execution, and the defendant George Young became the purchaser thereof, and had a good and lawful conveyance therefor, under execution sale. That H. T. Young, for George Young, on the day after the maturity of the note, collected the rents, to-wit, \$60, and has not accounted to the plaintiff for the same. That prior to the institution of the suit, that resulted in a judgment against Washington and the subsequent sale under it, the note made to Washington was transferred to plaintiff in the usual course of trade and for a valuable consideration. The defendants knew nothing of the transfer of the note to plaintiff at the time the rent was collected.

THOMAS E. KNIGHT, for appellant.—The present action cannot be maintained. The action for money had and received is based upon an implied assumpsit, and, like that for use and occupation of land, cannot be generally maintained against one holding lands adversely or in repudiation of the plaintiff's title, at the time of the defendant's occupation or the collection of rents by him.—*Lockhart v. Barton*, 78 Ala. 189; *Price v. Pick-*

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*ett*, 21 Ala. 741; *Fielder v. Childs*, 73 Ala. 567; *Weaver v. Jones*, 24 Ala. 423. Although there may have been a previous attempt to transfer the rent claim, all the rent which has not matured passed to the purchasers at a judicial sale of land which is at the time held by a tenant under an undetermined lease.—*Kirkpatrick & Co. v. Boyd & Boyd*, 90 Ala. 449.

DEGRAFFINRIED & EVINS, for appellee.—The right of plaintiff to recover in this case is affirmatively settled by the case of *Alabama Gold Life Insurance Company v. Oliver*, 78 Ala. 158, which cannot be distinguished from the case at bar.

SIMPSON, J.—This was an action for money had received, brought by the appellee (plaintiff) against the appellants (defendants). The amount in controversy was originally due on a note given by one Margaret Williams to one Washington, who at that time was the owner of the land, which note was, for a valuable consideration, and before its maturity transferred to the plaintiff. After said transfer of said rent note, the land, for the rent of which the note was given, was sold under an execution against said Washington to the defendant, and said defendant, without notice of the transfer of said rent note, collected the amount of rent due by the tenant. The only question argued by counsel is as to the right of the plaintiff to recover said money in this form of action.

It is insisted on the part of the appellants that the plaintiff could not recover in this form of action, because the action of assumpsit, for money had and received, rests upon an implied promise; and the case of *Lockhard v. Barton*, 78 Ala. 189, and others are cited to the point that a party who has collected rents, under claim of right, while occupying the land in question adversely to the party entitled, cannot be made to account for it in an action for money had and received. The reason given for the decision in that and similar cases is that "the title to lands cannot be tried collaterally in a personal action." On the other hand, it is clearly decided by the decisions of this and other courts that,

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while rent is an incident to the reversion, and if the land is conveyed before the rent falls due, without reservation, the party who owns at the time the rent falls due is entitled to the rent, yet the rent may be severed from the reversion by the owner of the land, and if he assigns the rent note before the land is sold either by his own conveyance, or under legal proceedings, the rent having thus been severed, the assignee of the note is the legal owner of the amount due thereon, and the purchaser of the land does not acquire any right to the rent.—*Ala. Gold Life Ins. Co. v. Oliver*, 78 Ala. 158, 161. After the rent has thus been assigned it has become simply a personal debt (though secured by a lien on the crops), and is not an incident to the reversion at all. The defendants in this case were not holding the land adversely to the plaintiff, for the plaintiff claimed no interest in the land at all, and there was and is no controversy about the title. It is simply a case where the defendant has collected a note which belonged to the plaintiff.

The action of assumpsit for money had and received is an "action in its spirit and purpose \* \* \* likened to a bill in equity, and is an exceedingly liberal action, and will always lie where a defendant has in his hands money which, *ex æquo et bono*, he ought to refund to the plaintiff."—*Rushton v. Davis*, 127 Ala. 279, 288, 28 South. 476. The case of *Kirkpatrick v. Boyd*, 90 Ala. 449, 7 South. 913 is not in conflict with what has been said. In that case the rent was not assigned until after the execution had been issued and was in the hands of the sheriff, and the reason given for that decision is that the execution, in the hands of the officer, operated as a lien upon the entire interest in the land, and the defendant in execution could not, after the lien had attached, impair its value by assigning the rent. It results that the action of the court, in giving the general charge in favor of the plaintiff, was correct.

The judgment of the court is affirmed.

TYSON, C. J., and HARALSON and DENSON, JJ., concur.

[Torry v. Krauss.]

**Torry v. Krauss.***Assumpsit.*

(Decided Feb. 14th, 1907. 43 So. Rep. 184.)

1. *Bankruptcy; Discharge; New Promise.*—A clear, distinct, un-equivocal promise to pay a debt discharged, made after promisor has been adjudged a bankrupt, will support an action at law.
2. *Same; Pleading.*—Under a promise to pay a discharged debt by the bankrupt, the creditor may proceed upon the promise, or may sue on the original debt, and reply the new promise to a plea of the discharge in bankruptcy.
3. *Same; New Promise; Definiteness.*—A promise to pay a debt discharged as soon as he is able binds the debtor, and is not void for uncertainty.
4. *Same; Action on Promise; Evidence.*—In an action on a new promise to pay a discharged debt it is necessary to allege and prove defendant's ability to pay, where the promise was that he would pay as soon as able; and proof of ability to borrow money is not sufficient.
5. *Same.*—Where the evidence did not disclose that the promisor had property other than his salary, which was necessary, undisputedly, to support his family, he was entitled to a direction of the verdict, and it was not prejudicial error to exclude evidence of his ability to borrow money.
6. *Evidence; Conclusions.*—In order to determine bankrupt's ability to pay it was permissible to ask him how much of his income was necessary for the support of his family, as such a statement was the statement of a collective fact and not a conclusion.
7. *Bankruptcy; Discharge; New Promise; Action; Evidence.*—In an action on a new promise to pay a discharge debt, an inquiry as to defendant's earnings two years subsequent to the commencement of the suit, was not proper.
8. *Same; Income of Debtor; Use of.*—A debtor, liable on a new promise to pay a debt discharged as soon as he is able, is not required to gauge his expenditures for the support of himself and family so as to enable him to meet the obligation.

[Torry v. Krauss.]

APPEAL from Mobile Circuit Court.

Heard before Hon. SAM'L B. BROWNE.

Action by J. B. Torrey against D. Kraus. Judgment for defendant, and plaintiff appeals.

INGE & ARMBRECHT, for appellant.—The court erred in permitting the witness to state that it took every cent of his income to support his family at the time the suit was instituted. This was a conclusion. The court erred in refusing to permit plaintiff to show what Krauss was receiving at the time of the trial.—*Feibleman v. Manchester F. Asso. Co.*, 108 Ala. 198; *L. & N. R. R. Co. v. Hurt*, 101 Ala. 44. A party may ask his own witness whether or not, on a former occasion he has made statements inconsistent with his testimony on the trial.—*Hemmington v. Garth*, 51 Ala. 531; *White v. The State*, 87 Ala. 26; *Thomas v. The State*, 117 Ala. 181. The refusal of the court to permit plaintiff to show the ability of defendant to borrow money was error.—*Krauss v. Torrey*, 40 South. 956. X

R. W. STOUTZ, for appellee.—Under the issues in this case it was necessary to prove that defendant became able to pay the indebtedness at or before the suit was tried. If ability to pay was not present until after suit filed the suit was premature.—*Hooper v. Birchfield*, 115 Ala. 226; *Carter v. Peck*, 121 Ala. 636; *L. & N. R. R. Co. v. Quinn*, 39 South. 616; *Birmingham Belt R. R. Co. v. Gorganous*, 37 South. 929. The question propounded to defendant as to what it took to support his family called for a collective statement of facts and not a conclusion.—*Shafer v. Hausman*, 139 Ala. 237. Under the evidence in this case the court might well have given defendant the affirmative charge, and if error intervened it was without injury.—*Griffin v. Bass & Co.*, 135 Ala. 490.

DENSON, J.—The plaintiff declared on a promissary note for \$175, executed on the 18th day of October, 1899, by the defendant, payable to McMillan Bros., 90 days after date, which note, it is averred, was duly assigned to the plaintiff. The defendant pleaded a discharge in bankruptcy in bar of the action. The plain-

[Torry v. Krauss.]

tiff replied that after the defendant had been adjudged a bankrupt, and after being discharged, the defendant promised to pay the debt for which the suit was brought as soon as he became able, and averred in replication that "the defendant is now able to pay the debt." Issue was joined on the replication, and trial had thereon, but at the conclusion of the evidence, on the defendant's motion, the court excluded "the evidence having reference to advances of loans, because it is not property, and does not show an ability to pay, but only an ability to borrow."

It is the settled doctrine of this court, supported by adjudications of the courts of other jurisdictions, that after a debtor has been adjudged a bankrupt he may, by a new promise to pay the original debt, if clear, distinct, and unequivocal, become liable therefor in an action at law; and the creditor may sue directly on the new promise, or, at his election, on the original debt, and reply the new promise to a plea setting up the discharge in bankruptcy.—*Wolff v. Eberlein*, 74 Ala. 99, 49 Am. Rep. 809; *Griel v. Solomon*, 82 Ala. 85, 2 South. 322, 60 Am. Rep. 733; *Kraus v. Torry*, 146 Ala. 548, 40 South. 956, and cases there cited. In *Griel v. Solomon*, *supra*, it is said: "Such a promise may be either absolute, or it may be conditional. But, if dependent on a condition or contingency, this fact must be stated by the pleader; and it must be averred and proved that the condition has been performed, or the contingency has happened. A promise to pay so soon as the bankrupt is able is a valid condition, not void for uncertainty, and is so held generally by the authorities. But, to be available, the promise must be averred in the proper form, and satisfactory proof adduced of the defendant's ability to pay; that is, the fact that he has sufficient property or means to pay."—*Mason v. Hughart*, 9 B. Mon. (Ky.) 480; *Hilliard on Bankruptcy*, 226; *Kraus v. Torry*, 146 Ala. 548, 40 South. 956.

When the case was here on a former appeal, we said, through Dowdell, J.: "That the defendant may borrow money is not alone sufficient to show his ability to pay his debts; for he might borrow on the bare face of his word and promise, as many good men have done, with-



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out owning any property whatever. This is not what the law means in such a case, when speaking of his ability to pay, coupled with his promise to pay when he was able; but, as stated in the authority above, it means that he has sufficient property or means to pay. Proof of ability to borrow might be competent as a circumstance in evidence for the consideration of the jury, in determining whether the defendant had sufficient property or means wherewith to pay, but not of an ability to pay without such property or means. The trial court seems to have proceeded upon the theory that ability to borrow was evidence of ability to pay. This theory was erroneous."—*Kraus v. Torry*, 146 Ala. 548, 40 South. 956. There was no effort made to show that the defendant had any means or property apart from his salary of \$300 per month, and the undisputed proof showed that it required all of the salary to support the defendant and his family; so that, in accordance with the ruling made in the case on the former appeal, the defendant was, on the evidence as it stood when the case was closed, entitled to the general affirmative charge, if it had been requested in writing. This being true, it follows that there was no error prejudicial to the plaintiff in granting the motion made by the defendant to exclude the evidence.—*Griffin v. Bass Foundry & Machine Co.*, 135 Ala. 490, 33 South. 177.

The question propounded to the defendant on his cross-examination by his counsel, namely, "How much of your income was it necessary for you to use for the support of yourself and family at the time this suit was instituted?" was not subject to the objection that it called for a conclusion of the witness. That which was called for was only a collective fact, or shorthand rendering of the facts.—*Shafer v. Hausman*, 139 Ala. 237, 241, 35 South. 691, and cases there cited.

The court properly sustained the objections propounded to the defendant on his rebuttal examination, by the plaintiff, the rulings in reference to which are covered by the second, third, and fourth grounds in the assignment of errors. On the former appeal it was held that the inquiry in respect to the defendant's earnings, and necessarily his net earnings after paying his

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family expenses, should be limited to the time previous to the commencement of the suit. The question under consideration called for evidence relating to transactions or conditions subsequent to the commencement of the suit—two years subsequent. Moreover, while such a course might be commendable, we know of no rule of law by which the defendant should be required to gauge his family expenditures so as to make himself possessor of means to meet promises of the kind in question. It may well be that a person receiving a stipulated sum as a monthly income, and consuming it all in the support of his family, would, if that sum should be reduced by one-half, endeavor to curtail family expenses, so that they would not exceed the income. At the same time, "the laws of the land do not require that a debtor whose family is in need, or who is himself exhausted by a protracted struggle with poverty and misfortune, should prefer a creditor to his family, or that he should appropriate his earnings to the payment of a debt from which the judgment of the law has released him, rather than to the support of his family or to his own comfort."—*Allen v. Ferguson*, 18 Wall. (U. S.) 1, 21 L. Ed. 854.

Furthermore, if the witness had answered the question in the affirmative, or as the plaintiff desired, yet the uncontradicted evidence that all of defendant's earnings were consumed in the support of his family prior to the commencement of the suit would have remained before the jury; and it was not proposed by the plaintiff to show that any of the earnings were saved.

We find no error prejudicial to the plaintiff in the record, and the judgment appealed from is affirmed.

TYSON, C. J., and DOWDELL and SIMPSON, JJ., concur.

[Armour Packing Co. of La., Ltd. v. Vinegar Bend Lumber Co.]

## Armour Packing Company of La., Ltd. v. Vinegar Bend Lumber Co.

*Assumpsit.*

(Decided Dec. 20th, 1906. 42 So. Rep. 866.)

1. *Corporations; Foreign Corporations; Right to do Business in this State.*—The State has the power to require a foreign corporation doing business in this State to file with the secretary of State a certified copy of its articles of incorporation, as provided by section 232 of the constitution of 1901.
2. *Same.*—A foreign corporation which was doing business in this State at the time of the adoption of the Constitution of 1901, having complied with all the provisions of the Constitution and statutes enacted prior to that time, must, in order to continue to do business thereafter, comply with Section 232 of the Constitution of 1901.
3. *Same.*—Section 232, Constitution 1901, is prohibitory and mandatory, and it is unlawful for a foreign corporation to transact business in this State without complying with its requirements, although no penalty for its violation is prescribed, and it is not declared that contracts entered into by foreign corporations without a compliance therewith are void.
4. *Payments; Application; Legal and Illegal Claims.*—Where a foreign corporation, which had not complied with Section 232 of the Constitution, sold goods to a buyer and shipped a part of them from its warehouse in Alabama to a point outside of the State, and the balance to the buyer's place of business in Alabama; and the buyer made payment, without directing the application thereof, in an amount more than enough to pay for the goods shipped outside the State, such payments must be applied to such debts as the debtor was legally bound to pay, and the foreign corporation had no right to apply the payments to the extinguishment of the claim that was illegal, even conceding that the Constitution did not apply to the sale of the goods shipped outside of the State.

APPEAL from Mobile Circuit Court.

Heard before Hon. SAMUEL B. BROWNE.

[Armour Packing Co. of La., Ltd. v. Vinegar Bend Lumber Co.]

Action by the Armour Packing Company of Louisiana, Limited, against Vinegar Bend Lumber Company. From a judgment for defendant, plaintiff appeals. Affirmed.

This was an action brought by appellant against the appellee in the circuit court of Washington county, seeking to recover the sum of \$346.89 due by account. The cause was removed by agreement of parties to the circuit court of Mobile county. The defendant interposed the following pleas: "Comes the defendant, and for further plea in this cause, entitled as above on the docket of this court, says that the plaintiff is a foreign corporation, and the account herein sued upon is on account of shipment of goods on orders of the defendant given to persons acting for plaintiff in the state of Alabama, and the goods were shipped during the month of August and September, 1902, from the store and warehouse of the plaintiff in Mobile, Ala., as follows, viz.: \$987.59 worth of said goods were shipped to Turner, Miss., and received by the defendant at its principal place of business at Vinegar Bend, Ala., and the balance of said goods, amounting to \$399.99, were shipped to defendant's place of business in the state of Alabama. That the defendant made payments to the plaintiff generally, without directing their application, on account of its purchases of said goods, as follows, viz.: \$693.79 on, to-wit, 15th of November, 1902; \$346.89 on, to-wit, March, 1903. And the defendant avers as negative matter that the plaintiff had not complied with the laws of the state of Alabama, so as to entitle the plaintiff to do business in this state, in that it had not, at the time of the said transactions with defendant in the matter of the order and shippers of said goods, filed with the secretary of state of Alabama a certified copy of its articles of incorporation or association." Demurrers were interposed to this plea: Because it is double, in that it attempts to set up payment of the account sued on and also the failure of the plaintiff to comply with the laws of Alabama, so as to entitle it to do business in this state; and because it fails to set out any facts showing payment of the account sued on, nor does it allege that the plaintiff was not doing business in this state prior

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to the time when the Constitution of Alabama, providing that no foreign corporation shall do any business in this state without filing with the secretary of state a certified copy of its articles of incorporation or association, became effective; and because said plea fails to allege that the goods shipped by plaintiff to Turner, Miss., have been paid for; and because said plea fails to allege that the payments made by defendants to the amount of the purchase price of the goods shipped by plaintiff to Turner, Miss., were made in payment of said goods. These demurrers were overruled, and the judgment was for defendant upon its plea.

MITCHELL & TONSMERE, for appellant.—Section 232 of the Constitution of 1901, does not apply to foreign corporations which were doing business in this state at the time the Constitution went into effect, and which had complied with all the laws of the state existing at that time.—*State v. Hartford Fire Ins. Co.*, 99 Ala. 221; Southerland on Statutory Construction, § 464; Black on Interpretation, p. 252; *Lydecker v. Babcock*, 55 N. J. Law, 394; *State v. Connell*, 43 N. J. L. 106; *Gaston v. Merriam*, 33 Minn. 271. It will be presumed in the absence of proof to the contrary that foreign corporations have complied with the laws of the state in reference to doing business therein.—13 A. & E. Ency. of Law (2nd Ed.) 903; Murphree on Foreign Corporations, § 96. Where the complaint does not show that plaintiff is a foreign corporation the burden is upon the defendant to set up that fact and prove it and to show that it has not complied with the laws of the state.—*Christian v. A. F. M. Co.*, 89 Ala. 198; *Eslava v. N. Y. B. & L. Asso.*, 121 Ala. 484; 6 Thompson's Corp. § 6345; 2 Enc. of Evidence, 803. The state in its sovereign capacity is the only party who can take advantage of the failure of the foreign corporations to comply with its laws.—*Derringer v. Derringer*, 1 Am. St. Rep. 150; *Foster v. Betcher Lbr. Co.*, 49 Am. St. Rep. 859.

CHARLES M. BROMBERG, and MASSEY WILSON, for appellee.—The granting of the motion of appellee to strike from the file the replication to the 9th plea cannot be

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considered as it is not presented by bill of exceptions.—*Gaston v. Marengo County*, 139 Ala. 465; *Jones v. Aniston*, 138 Ala. 199; *Southern Ry. Co. v. Cranshaw*, 136 Ala. 572. The 1st grounds of demurrer to the 9th plea was properly overruled.—4 Mayf. Dig. p. 468. The second ground was also properly overruled.—4 Mayf. Dig. 468. The matter of doing prior business in the state suggested by demurrer, if meritorious, is in avoidance and must be presented by way of replication.—Code 1896, § 3309; *Culberson v. A. T. & B. Co.*, 107 Ala. 457. The state has authority to exclude foreign corporations altogether and may impose any restrictions which may be proper as a condition upon which they can do business in the state.—*Noble v. Mitchell*, 100 Ala. 519; 19 Cyc. 1251; Sec. 232 of the Constitution of 1901 is prohibitory and needs no legislative action to give it force and effect.—*A. U. Tel. Co. v. W. U. Tel. Co.*, 67 Ala. 26; *Sullivan v. Vernon*, 121 Ala. 393. The permission granted a foreign corporation to do business in the state rests on comity and may be withdrawn.—*State v. Hammond Packing Co.*, 110 La. 180; *Bedford v. E. B. & L. Asso.*, 181 U. S. 227.

As to the application for payment the law is that the application will be to such debt as the debtor is legally bound to pay and not to such as he is not bound to pay.—*Royston v. May*, 71 Ala. 400; 2 A. & E. Ency. of Law (2nd Ed.) 442. Under the facts in this case the shipment was not interstate commerce.—19 Cyc. 1229.

TYSON, C. J.—The right of foreign corporations to do business in this state rests upon comity, and not upon any contractual obligations. It was, therefore, entirely competent for the constitutional convention, in ordaining the present Constitution, to impose upon foreign corporations doing business in this state at the date of its adoption the additional requirement of "filing with the secretary of state a certified copy of its articles of incorporation."—Section 232, Const. 1901. This proposition, however, does not seem to be controverted. But the contention is that this requirement does not apply to corporations which had complied in all respects

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with the requirements of the prior Constitution and statutes and were doing business in the state when the present one was adopted; that the words "no foreign corporation shall do any business in this state," etc., have reference only to foreign corporations which began to do business after the adoption of the Constitution. The insistence is clearly without merit; and this holding does not give, as seems to be contended, a retroactive effect to the clause.

A foreign corporation having a place of business in this state and engaged in doing business at the date of the adoption of the Constitution, which continues to do business afterwards, is doing business as much so as if the same corporation had not entered the state until after the Constitution was adopted and then began to do business. The clause of the Constitution under consideration is prohibitory, and needs no legislation to carry the mere prohibition into effect or to give it force. It is therefore unlawful for a foreign corporation to transact any business here without a compliance with its conditions, and all contracts into which it may enter, while executory, requiring the aid of the courts to enforce them, are void.—*Sullivan v. Vernon*, 121 Ala. 393, 25 South. 600, and authorities there cited. See, also, *Am. U. Tel. Co. v. W. U. Tel. Co.*, 67 Ala. 26, 42 Am. Rep. 90. It is wholly unimportant that the prohibitory clause provides no penalty for its violation, or that it omits to declare that all contracts entered into by the corporation in violation of it shall be void.—*W. U. Tel. Co. v. Young*, 138 Ala. 240, 36 South. 374, and cases there cited.

The averments of the plea also show that defendant, at different times, made payments to plaintiff on the account for the goods sold to it, without directing their application, aggregating a sum in excess of the value of those which were shipped to a point in the state of Mississippi, leaving the balance for which a recovery is sought, for the goods sold and delivered by plaintiff from its place of business in this state to the defendant at its place of business, which was also in this state. If it be conceded that the constitutional provision has no

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application to the sales of those goods which were shipped to a point in Mississippi, because it involved an interstate commerce transaction, a question not necessary to be decided, the payments made must be applied to those sales, no matter whether the sales were anterior or subsequent to the sale of the goods delivered in this state. The rule is that the application of payments will be to such debts as the debtor is legally bound to pay. The creditor has no right to apply them to the extinguishment of illegal or unenforceable demands without the debtor's consent.—*Royston v. May*, 71 Ala. 400; 2 Am. & Eng. Ency. Law (2d Ed.) p. 442, and notes. Of course, if all the sales of the goods made by plaintiff involved the doing of business in this state in violation of the constitutional provision, no recovery could be had, and the plea was therefore unobjectionable. There is clearly no error in the record of which the appellant can complain.

Affirmed.

HARALSON, SIMPSON, and DENSON, JJ., concur.

**Owensboro Wagon Co., v. Hall  
and  
Hall v. Owensboro Wagon Co.**

*Assumpsit.*

(Decided Feb. 7th, 1907. 43 So. Rep. 71.)

1. *Appeal; Review; Discretion.*—Whether the court will permit a demurrer to be interposed to a plea after the cause is submitted to the jury, is addressed to its discretion, and not reviewable on appeal.
2. *Pleading; Departure.*—It is not a departure to add by amendment counts on a special contract to counts on the common count, where such special contract is the foundation of the action on the common count.



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3. *Same; Motion to Strike; Demurrer.*—Pleas that are neither prolix, irrelevant or frivolous, must be tested by demurrer, and not by motion to strike.
4. *Appeal; Harmless Error.*—Evidence that defendant was about 76 years of age, although immaterial, was harmless.
5. *Evidence; Letters; Proof of Genuineness.*—Defendant cannot show by letters, purporting to be from plaintiff, that plaintiff was notified of a certain fact, without making proof that such letters offered in evidence for that purpose, were genuine, objection having been made on that ground.
6. *Same; Secondary Evidence; Search for Primary Evidence.*—The statement "I cannot find them," is not the equivalent of proof that the required search had been made for the primary evidence, so as to authorize the introduction of secondary evidence.
7. *Pleading; Replication.*—To be good a replication must answer every material allegation of the plea
8. *Account; Action on; Verified Account; Affidavits Taken in Other States; Authentication.*—Under Section 1799, on account verified by affidavit taken before a notary in another State, to which affidavit is attached the seal of office of such notary, is sufficient authentication, and not objectionable, that a notary without the State, cannot administer an oath unless authorized to do so by the law of the State of his residence.
9. *Salcs; Distinguished from Other Transaction; Evidence.*—On the issue as to whether the wagons were sold defendant, or whether defendant held them as plaintiff's agent, a warehouse receipt for the wagons taken by the defendant after the commencement of the suit, is admissible as a circumstance to be considered by the jury.
10. *Appeal; Harmless Error; Instructions.*—As a general rule, the giving or refusing of abstract or argumentative instructions, will not work a reversal of the cause.
11. *Same; Law of the Case; Instructions.*—The giving of an instruction which asserts a proposition contrary to the law of the case as formerly decided, is error.
12. *Estoppel; Assertion of Title.*—As to whether the wagons were sold to defendant or whether he was holding them as agent of the plaintiff, the fact that he stored the wagons in his own name claiming them as his own, will not estop him from explaining by competent evidence his reasons for so storing them.

APPEAL from Bessemer City Court.  
Heard before Hon. WILLIAM JACKSON.

[Owensboro Wagon Co. v. Hall and Hall v. Owensboro Wagon Co.]

Action by Owensboro Wagon Company against John A. Hall. Judgment for defendant. Plaintiff appeals, and defendant takes a cross-appeal. Reversed and remanded.

The complaint was originally on the common counts, and on the second trial was amended by the addition of the sixth and seventh counts, as follows:

"(6) The plaintiff claims of the defendant the sum of (\$670.00) six hundred and seventy dollars by reason of a contract in writing as follows:

"Owensboro, Ky. 3-7-1901. John A. Hall, Bessemer—  
Dear Sir: Respecting your request to handle our wagons on consignment in Bessemer, Alabama, and vicinity, we shall be pleased to commission you as your orders may be approved by us from time to time; proceeds of sale, less invoice price, to be your commission. In consideration of our doing so, and extending you this credit, we ask you to undertake and contract as follows:

"First. Of all goods, handle and sell our to the exclusion of all other makes.

"Second. Until goods consigned hereunder are sold, diligently to do all business required to sell said goods, pay all taxes, freight, and other expenses of same, keep well housed and protected from the weather and in good order. In case of loss by fire or damage or other cause, pay us invoice price.

"Third. On the 1st of each month, and whenever requested to do so by us or our authorized traveling salesmen or collectors, to render a statement of all goods on hand.

"Fourth. Invoice prices are to be mutually agreed upon at the time orders are accepted for shipment.

"Fifth. For all sales, as soon as made, send us cash less 5 per cent. on your note for four months for the amount from date of sale, with purchaser's note indorsed by you as collateral security, if at any time your account exceeds our limit of credit. The cash discount not to be allowed on sales after 12 months from date of each invoice; all remittances to be at invoice prices.

"Sixth. To extent of invoice price, moneys, proceeds, or securities taken or received by you on account of goods shall be our property, received and held in trust

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for us and kept by you as separate funds for us until goods are settled for as above, and the title for all goods shipped on this contract shall be and remain in our name, until we receive settlement therefor.

“‘Seventh. You will, if demanded, purchase at invoice price in cash or your four-months note, with interest at 8 per cent. until maturity, with approved collateral notes attached, if requested, all goods unsold after 12 months from date of each invoice, or at once in case you shall sell or dispose of the merchandise business in which you are engaged.

“‘Eighth. We can revoke this contract at any time if you fail to discharge any obligations hereunder, or if we have reason to believe you are unable to perform the same, and upon the return of goods for any cause, termination or revocation of this contract, you will deliver to us in your town all our goods then on hand in as good condition as when received, paying for any damage to same, free of all charge. If, however, termination is made other than by reason of your act or breach, we will pay actual freight, which shall be a claim against us, subject to offset of any claim we have against you.

“‘Ninth. We deliver all goods free on board, Owensboro, Ky., and will endeavor to ship by cheapest route, making freight as low as possible, but will not be responsible for any other charges.

“‘Tenth. Our failure to enforce at any time any provision of this contract, or our exercising option, hereby conceded, at any time for the time being to waive performance on your part of any of the provisions hereof, shall in no wise impair the validity of this contract or such provision, or our right to enforce the same. If this is satisfactory, please sign as indicated below, and return to us, on receipt of which we will at this office consummate same by our signature as a contract between us, sending you a copy, which embodies our entire understanding and cannot be modified, except by writing duly executed by us. (Signed) Owensboro Wagon Co., by B. M. Settle.

“‘The above is satisfactory. (Signed) John A. Hall.’

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"And plaintiff avers that it made demand upon the defendant to purchase all the unsold wagons then on hand on, to-wit, the 6th day of May, 1902, and the defendant then and there refused to do so.

"(7) Plaintiff as part of this count adopts all the words and figures of the sixth count hereof down to and including the contract between the plaintiff and defendant therein set out, and plaintiff avers that on the 9th day of December, 1901, the plaintiff was informed that defendant had disposed of or sold his mercantile business, and thereafter, to-wit, on the 6th day of May, 1902, demanded that the defendant purchase stock of wagons, etc., then in defendant's hands, as is provided for in the seventh paragraph of said contract, and the defendant then and there refused to purchase as provided in paragraph 7 of this contract."

The defendant interposed a motion to strike the last two counts, because they are departures from the original complaint on the common counts, and because the last two amendments fail to aver or show any cause of action, and on various other grounds not necessary to be set out. Demurrers were filed on practically the same grounds. The court granted the motion, and struck the sixth and seventh counts.

The fourth plea filed by defendant sets up the contract set out in the complaint, and avers that the account upon which this suit is founded is for a lot of wagons shipped by plaintiff under the conditions of the contract, and that long before 12 months expired next after the date of shipment of such wagon the defendant resigned his agency under said contract, offered to settle with plaintiff and deliver the unsold wagons to plaintiff at Bessemer, Ala., and informed the plaintiff that the wagons were there subject to his orders. Said plea also contained an offer to settle and return the wagons. The other acts of the court concerning this plea are sufficiently set out in the opinion.

The fifth special plea is as follows: "The defendant says that said contract as set out in the defendant's fourth plea was made and entered into with reference to and because of the fact that the defendant was at that time engaged in a mercantile business, as is shown

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by said contract in and by section 7 thereof, which provides that the defendant should, if demanded, purchase at invoice price in cash or his four-months note, with interest at 8 per cent., with approved collateral note attached, if requested, all goods unsold after 12 months from date of each invoice, or at once in case he sold or disposed of the mercantile business in which he was engaged. And defendant avers that he disposed of the mercantile business in which he was so engaged by selling the same out in, to-wit, the month of June, 1901, and promptly thereafter gave the plaintiff notice of the fact that he had disposed of his said mercantile business, and offered to turn over to plaintiff all the goods and property he had received from and was holding for it under said contract that had not been disposed of, and also offered to turn over to plaintiff, and did turn over to it, all money it was entitled to or that was owing to it for goods of the plaintiff that had been sold by the defendant under said contract, and he repeated such offer and notice several times, which offer defendant avers he is still ready and willing, and hereby offers, to still carry out and perform. And defendant avers that the plaintiff, thereafter, had full notice of the fact about the defendant having so disposed of his said business as aforesaid, and that, notwithstanding this, the plaintiff refused or declined to take the goods back, and refused or declined to elect or require the defendant to purchase goods which he so held for the plaintiff under said contract; but, to the contrary, the plaintiff insisted in going on and did go on treating the defendant as its agent under and according to the terms of said contract, and the defendant accordingly went on as plaintiff's agent, handling its property under said contract. Wherefore defendant avers that plaintiff lost and waived its right to effectually elect, require, or even demand that the defendant purchase said goods or property, or even treat him as a purchaser, and by reason thereof the plaintiff is estopped from demanding or compelling the defendant in any sense to purchase said property or any part thereof."

The following demurrers were interposed to the fifth plea as amended: "Because the plea does not aver that

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the defendant accepted the agency and acted as such agent. Because under the contract the plaintiff had a right to decline to take the goods back. Because the averments of the plea show that the defendant went on handling the goods, wagons, etc., under the contract, thereby disaffirming the establishment of an agency subsequent to the going out of business by the defendant. Because the facts alleged in said plea are insufficient to show that a new contract had been created by the dealings of the parties subsequent to the selling out by the defendant of its mercantile business."

The defendant filed the following plea as plea 7: "The defendant says that the plaintiff, after the time when the defendant sold and disposed of his mercantile business and offered to return and pay for the goods as set up in the defendant's fifth plea, the plaintiff understanding all the circumstances, treated the defendant as its agent in handling the goods of the plaintiff, by running on under said contract of agency in carrying on the business of said agency. Therefore the plaintiff waived and lost its right to treat the defendant as a purchaser, or even demand or elect to so treat him thereafter."

Demurrers were interposed to this plea: "Because said plea is no defense to this action. Because under said contract, if plaintiff should treat and regard defendant as its agent, it would not be a defense to this action, and show that plaintiff had waived or lost any right thereunder. Because plaintiff had a right to treat defendant as its agent, and according to the terms of said contract plaintiff could maintain this action after treating defendant as such. Under said contract plaintiff had the right to enforce or reject the return of the goods. Said contract contains no condition by which defendant can return goods without the consent of the plaintiff."

The plaintiff replied to the fifth plea as amended, and to the fourth and seventh pleas: "(1) It denies each and every allegation of said plea. (2) That there was no understanding or agreement on the part of the plaintiff that the defendant was to act and did act as agent of the plaintiff after it had knowledge that de-

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defendant had sold or disposed of his mercantile business, nor did it instruct the defendant to sell said wagon and remit monthly or otherwise. (3) That, notwithstanding defendant notified plaintiff that he had quit his mercantile business and offered to return the wagons, the defendant claimed said wagons as his own, and stored the same as his own, and paid the storage thereon after he had gone out of the mercantile business. (4) The defendant insisted upon turning over to plaintiff the wagons on hand and settling for those sold, but plaintiff repeatedly told the defendant that it would not accept those terms, but would hold defendant to a compliance with his contract. (5) That it was not notified that the defendant had gone out of business or had quit his mercantile business until December 9, 1901, and that, upon being informed, plaintiff then and there wrote defendant that it had a contract with him which it had complied with, and it expected a compliance on his part. (6) Plaintiff says that it has never treated the defendant as its agent for any purpose since it demanded that he purchase the wagons on hand, as is provided in the seventh paragraph of the said contract. (7) That on, to-wit, the 16th day of August, 1901, the defendant wrote the plaintiff, assuming responsibility of said contract, in words and figures as follows: "I am very sorry that I ever ordered them (referring to the wagons), and would not have done it, if it had not been that Oden insisted so much on it, and, as soon as I got the wagons, he quit and left me with the whole amount of responsibility on my hands, and I don't know how I can meet the responsibility, but I will do the best I can. I will report to you again in a few days. Yours respectfully, John A. Hall. P. S. I don't want to lose anything by one and don't intend to let you lose any on my act. J. A. H.' By which letter plaintiff says the defendant assumed the responsibility of said account and the payment thereof subsequent to his selling out or disposing of his mercantile business as averred in said pleas. (8) That defendant, in signing said contract, agreed in paragraph 10 of the same that our failure to enforce at any time any of the provisions of this contract, or our exercising option, hereby conceded,

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to at any time for the time being waive preformance on your part of any provision hereof, shall in no wise impair or affect the validity of this contract, or such provisions, or our right to enforce the same.' That under said contract, and the provisions thereof, the plaintiff did not exercise the option of demanding that the defendant purchase the wagons then on defendant's hands until the 6th day of May, 1902, and by the failure of the plaintiff to make said demand immediately upon the defendant quitting the mercantile business , or the continuing to carry on said business, under the provisions of the contract, the plaintiff did not lose or impair its right to treat the defendant as a purchaser on making demand as provided in said contract."

Demurrers were interposed to these replications as follows: "Separately and severally, to each, from 2 to 8, inclusive, upon the grounds that neither of said replications set up a valid legal defense to the matters and things set out in either said fifth, fourth, or seventh pleas. And especially to replication 2 upon the ground that it is no answer to either of pleas 5 and 7, and in that it neither confesses nor avoids any of the allegations of the same, and because it is merely the general issue. And to replication 3 because it sets up no valid defense to said pleas 5 and 7. And, further, to replication 3 that, even though the defendant did store the wagons as his own, and paid the storage thereon, after defendant had gone out of business, the mere fact of his doing so is no valid legal replication, answer, or defense to the facts set up in pleas 5 and 7. It fails to confess, deny, or avoid, or confess and avoid, the facts averred in said pleas 5 and 7 to the effect that the defendant continued to act as the agent of plaintiff in handling his wagons at the plaintiff's request after the defendant had sold out and disposed of his mercantile business and fully informed the plaintiff thereof. And because said replication fails to aver that there was an agreement between plaintiff and defendant, or any other transaction, by which the title to the property passed from the plaintiff to defendant. To replication 4, because the same sets up no fact constituting a valid legal defense to the matter set up in pleas 5 and 7; because



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it is no answer to these pleas, and merely sets up what plaintiff told defendant; and because it fails to confess and avoid any of the facts set up in said plea and fails to traverse any fact therein set up." These same demurrers were interposed to all the replications, with the additional demurrers that the replications may be true, and yet the plea be good, and because said replications and each of them leave a material part of the pleas unanswered.

Defendant requested the court to give the following charge, which the court gave: "(4) The court further charges the jury that if you are reasonably satisfied from all of the evidence that the defendant disposed of his mercantile business about June, 1901, and that he promptly thereafter informed the plaintiff that he had disposed of his business, and if you further are reasonably satisfied that the plaintiff, after he had so been informed, went on dealing with him and treating him as its agent under the contract, and that they did this, prior to the expiration of the year next after the contract for handling the wagons, etc., took effect, then I charge you that this would constitute a waiver of the plaintiff's right to elect to treat the defendant as a purchaser of the property."

Written charges numbered 9 and 10, given at the request of the plaintiff, are as follows: "(9) I charge you, gentlemen of the jury, that you must find for the plaintiff unless you believe from the evidence that the plaintiff, subsequent to the demand made upon the defendant to purchase, treated and did business with the defendant and recognized him as its agent. (10) I charge you that if the evidence in this case reasonably satisfies you that the defendant, after demand had been made upon him to purchase said wagons, stored the same and claimed them as his own and paid storage on them, he is then estopped to claim that he was only holding them as agent for the plaintiff."

Charges 1 and 2, requested by the defendant and refused, were the general affirmative charge. Charge 3, refused to defendant, was: "The court further charges the jury that if you are reasonably satisfied from all of the evidence in this case that the defendant disposed of

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his mercantile business about June, 1901, and that he promptly thereafter informed the plaintiff that he had disposed of his mercantile business, and if you are further reasonably satisfied from the evidence that the plaintiff, after it had been so informed, went on dealing with him and treating him as its agent under the contract, and that they did this prior to the expiration of the year next after the contract for handling the wagons, etc., took effect, then I further charge you that this would constitute a waiver of the plaintiff's right to elect to treat the defendant as a purchaser of the property, and you must find your verdict for the defendant."

There was judgment for defendant, and from the action of the court on the trial both plaintiff and defendant took this appeal.

W. F. PORTER, and BEN G. PERRY, for appellant, on direct appeal, and appellee on cross appeal.—The court should have permitted appellant to amend his 6th count and after amendment it was not subject to motion to strike.—*Birmingham Ry. & Elec. Co. v. Allen*, 99, Ala. 359. The sufficiency of a plea to be tested by demurrer and not by a motion to strike unless it is prolix, irrelevant or frivolous.—*A. G. S. R. R. Co. v. Clark*, 136 Ala. 461. There was no departure in the amendment.—*Nelson v. Bank of Montgomery*, 139 Ala. 578. Before secondary evidence is admissible the original must be sufficiently accounted for.—1 Greenl. Evi. (16th Ed.) p. 682. Counsel discuss other assignments but cite no authority.

ESTES, JONES & WELCH, and W. K. SMITH, for appellee, on direct appeal, and appellant on cross.—The office of a replication is to reply to a plea, traverse it, confess and avoid it or set up something by way of estoppel and a replication that merely joins issue on a plea or denies the plea or affirms the complaint, is demurrable.—*Wright v. Forgy*, 126 Ala. 389; *H. A. & B. R. R. Co. v. South*, 112 Ala. 642; *L. & N. R. R. Co. v. Mothershed*, 110 Ala. 143. A replication should go to the whole

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plea and not a part only.—*Whitehurst v. Bird*, 8 Ala. 375; *Mason v. Craig*, 5 S. & P. 389; *H. A. & B. R. R. Co. v. South*, *supra*. A notary public has only such powers and can exercise only such as are given him by the commercial law unless their powers are enlarged by statute, which fact must be shown before such acts or things which are made essential by such acts are admissible in evidence.—*Chandler v. Hanna*, 73 Ala. 390; *Comer v. Way & Edmondson*, 107 Ala. 300; *Gorce v. Wadsworth*, 91 Ala. 416; *Alabama National Bank v. Chattanooga B. & S. Co.*, 103 Ala. 63; 21 A. & E. Ency. of Law, 562.

DOWDELL, J.—This is the second appeal in this cause by the plaintiff, the Owensboro Wagon Company. When the cause was here on the former appeal, the contract, the foundation of the suit, was construed by this court in an opinion by Anderson, J., concurred in by McClellan, C. J., and Tyson and Simpson, JJ.—*Owensboro Wagon Co. v. Hall*, 143 Ala. 177, 42 South. 113. For reasons then stated the defendant's fourth and fifth pleas were held to be bad, and subject to the demurrers interposed, and the seventh plea was held to be good, and not open to the demurrer. No formal judgment was rendered in this court sustaining the demurrers to the fourth and fifth pleas, held to be bad, but simply a judgment of reversal of the judgment of the trial court in overruling the demurrers to the fourth and fifth pleas, and a remandment of the cause. This left the cause for further action to be tried in the trial court on the demurrers to the said pleas, in accordance with the views and rulings of this court, unless the parties saw fit to abandon the demurrers. The case, therefore, as it stood in the trial court after remandment, was without any judgment on the demurrers to these pleas.

It appears from the record that, after remandment of the cause, the defendant amended his fifth plea in conformity with the ruling of this court and to meet the defects pointed out by the demurrer, but nothing was done toward amending the fourth plea. No judgment of the court was taken or had on the demurrers originally filed to this fourth plea. In this state of the record it will be presumed on appeal that the plaintiff did

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not insist on its demurrer to the fourth plea, but abandoned the same. After the issues were made up, and the cause had been submitted to the jury, the plaintiff then asked leave to file demurreis to the fourth plea, which the court declined to permit. At this stage of the trial, to withdraw the case from the jury and allow the plaintiff to demur to the plea was matter addressed to the discretion of the trial court, and the court's ruling on the same is not revisable on appeal. The fifth plea, as amended, conforming to the views heretofore expressed by this court on former appeal was unobjectionable on grounds assigned in the demurrer filed to it, and the court, therefore, properly overruled the demurrer.

The complaint, as originally filed, was on the common counts. The plaintiff, after the remandment of the cause, by leave of the court, amended its complaint by adding two counts, numbered 6 and 7, on a special contract set out in the complaint as amended. Thereupon the defendant moved to strike the counts added by way of amendment, which motion the court granted, and struck the amendment from the file, to which action of the court the plaintiff duly excepted, and this ruling is here assigned as error. The amendment constituted no departure in pleading, and, while it set up a new claim in the suit different from the common counts, it did not introduce an entirely new and different cause of action from that originally declared on.—*Nelson v. First National Bank*, 139 Ala. 578, 36 South. 707, 101 Am. St. Rep. 52. The defendant had already filed pleas in which it was averred that this same contract, declared on in the amendment to the complaint, was the foundation of plaintiff's suit on the common counts. There were other grounds of the motion to strike; but we do not consider this question further than to say that the proper mode of testing the sufficiency of pleadings, when neither prolix, irrelevant, or frivolous, is by demurrer, and not by motion to strike.—*A. G. S. R. R. Co. v. Clarke*, 136 Ala. 461, 34 South. 917. The court erred in sustaining the motion to strike the amendment.

The age of the defendant was wholly immaterial and irrelevant to any issue in the case, but we are unable to

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see wherein the plaintiff was prejudiced by the admission of this evidence; the evidence being that he was about 76 years old.

It was competent and admissible in evidence for the defendant to show that he notified the plaintiff of his going out of the mercantile business. But in doing this, by introducing letters purporting to be from the plaintiff, it was incumbent on the defendant to offer evidence of the genuineness of the letters, when their introduction was objected to on this ground, before the same could become admissible. In the course of the examination of the defendant as a witness in his own behalf, he stated: "I received other letters from the Owensboro Wagon Company, but I can't find them. I don't know what were the contents of these letters." Defendant's counsel then asked the witness: "What was in those letters?" "State the contents, as far as you can remember." The plaintiff objected to the question on the ground that the letters were the best evidence, and that no sufficient predicate had been laid for the introduction of secondary evidence. The court overruled the objection, and the witness then answered, giving his recollection in a general way of the contents of the letters, which answer the plaintiff moved to exclude on the same grounds stated in his objection to the question; but the court refused to exclude, and to all of which action of the court the plaintiff duly excepted. The mere statement of the witness that "I can't find them" (the letters) did not show that he had made search for them, and fell far short of showing a diligent search and failure to find, a necessary predicate for the introduction of secondary evidence of the contents of the letters. The trial court erred in overruling the objection to the question and in admitting this evidence.

There was no error in admitting the statement of accounts offered by the defendant. He testified that he received these statements from the plaintiff, and, further, that he never had any transaction with the plaintiff, as to any wagons, but the one which was the foundation of this suit. Under the issues, we think this evidence of the return to the plaintiff of the unsold wagons competent and admissible.

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It is insisted by counsel for the plaintiff that the plaintiff, under the contract, had the option, at the expiration of 12 months from the date of the invoice, of treating the defendant as a purchaser of any wagons remaining in his hands unsold at such time, and that no acts or conduct of the plaintiff before such time arrived, in treating the defendant as its agent in the holding of the wagons after the defendant had disposed of his mercantile business in which he was engaged at the time he entered into the contract, could operate as a waiver of plaintiff's said option to hold the defendant as a purchaser. This insistence is opposed to what was ruled by this court when the case was here on the former appeal. We now adhere to the views then expressed.

Written charge No. 4, given at the request of the defendant, correctly stated the law of the case as heretofore ruled, and was otherwise unobjectionable, and therefore properly given.

This brings us to the consideration of the assignments of error on the cross-appeal.

To the defendant's fifth plea as amended, and to the fourth and seventh pleas, the plaintiff filed special replications, numbered from 2 to 6, inclusive. These replications were not made to these pleas separately, but to them as a whole. Neither of these replications deny the allegations of the pleas, except in part, leaving material allegations without denial and without confession and averment of matter in avoidance. A good replication to a plea should be either a traverse of the plea or a confession and avoidance. It may deny in part, and confess and avoid in part; but in any event it must answer every material allegation of the plea to constitute good pleading.—*H. A. & B. Ry. Co. v. South*, 112 Ala. 643, 20 South. 1003; *Whitchurst v. Byrd*, 8 Ala. 375; *Mason v. Crabb*, 3 Stew. & P. 389. The replications do not deny the allegations in the pleas of the plaintiff's waiver of its option to elect to hold the defendant as a purchaser, nor do the facts set up in the replication amount to a confession and avoidance of the allegations of a waiver. The demurrers should have been sustained to the replications; and for the same reasons the demurrers should have been sustained to

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special replications 7 and 8, which were filed to the fifth and seventh pleas.

The objection to the admission of the verified account, on the ground that a notary public without the state cannot administer an oath, unless authorized to do so by the law of the state of his residence, is untenable. The authority of a notary public of another state to take and certify to affidavits in certain cases is provided for by our statute (section 1799 of the Code of 1896), which reads as follows: "Affidavits required in the commencement or progress of any suit or judicial proceedings may be taken without this state before any commissioner appointed by the governor of this state, and the judge or clerk of a federal court, or judge of any court of record, or notary public, who shall certify under their hands and seals of office, if any." To the affidavit in this case was attached the seal of office of the notary. This was sufficient authentication and certification under the statute. The account was itemized and verified, and was admissible in evidence under section 1804 of the Code. The suit was upon account, and it was averred in the complaint that the account was verified, and no counter affidavit was filed by the defendant under the provisions of the statute.

The warehouse receipt, although signed and given by the defendant after the commencement of the suit, was nevertheless a circumstance to be considered by the jury under the issues in the case. If, as a matter of fact, the defendant claimed the wagons as his property at the time he gave the warehouse receipt, it was competent evidence to go to the jury; and it is of no consequence, in determining the competency of the evidence, that it occurred subsequent to suit brought.

It is the better and safer practice to refuse charges which are purely abstract, or when argumentative; but the giving of such charges does not, as a rule, constitute reversible error.

Charge 9, given at the request of the plaintiff, was erroneous, and should have been refused. Under the law of the case as stated above, if the plaintiff waived

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its option under the contract to hold the defendant as a purchaser of the wagons, then the plaintiff by a subsequent demand could not restore that right of option.

Charge 10, requested by plaintiff, should not have been given. If the defendant had stored the wagons in his own name, claiming them at the time as his own, this would not have estopped him from explaining by competent evidence his conduct in so doing. This the charge prevented him from doing.

There was no error in refusing charges 1, 2, and 3, requested by the defendant.

For the errors pointed out, the cause will be reversed, both on the direct and cross appeal.

Reversed and remanded.

TYSON, C. J., and ANDERSON and McCLELLAN, JJ., concur.

## Henderson-Boyd Lumber Co. v. Cook.

### *Assumpsit.*

(Decided Dec. 20th, 1906. 42 So. Rep. 838.)

1. *Contract; Compensation; Extra Work.*—A person doing work known as "old grading" which was not included in his contract, but which was necessary to be done in order to complete certain work contracted to be done, is entitled to additional compensation for whatever the extra work was reasonably worth.
2. *Evidence; Opinion Evidence; Expert Testimony; Construction of Contract.*—As to whether "old grading" is or is not included in "surfacing" mentioned in the contract, it is competent for those shown to be acquainted with that class of railroad construction work to say what the term of "surfacing" means, and whether it included "old grading" or not, which was necessary in that particular place.
3. *Same; Evidence of Custom.*—It is competent to show by those acquainted with that class of railroad construction work what is the custom of railroad contractors doing the same class of



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work, as to additional compensation for such work, and the reasonable amount of such compensation.

4. *Customs; Establishment; Evidence; Jury Question.*—Where a railroad contractor sought to recover for extra items of work done outside the contract and testified that all the extra items were necessary and that with items of this kind it is the custom of railroad contractors to charge it at actual cost, plus ten per cent. this evidence afforded some proof of the custom, and as to its sufficiency, it was a question for the jury.
5. *Damages; Liquidated Damages and Penalty; Forfeiture on Breach.*—A contract providing that the contractor was to receive \$350 per mile for doing certain work, three hundred of which was to be paid as each mile was accepted, and the \$50.00 to be held back for each mile until the contract was completed, which was a guarantee for the completion of the work, such a stipulation was for a penalty and was not liquidated damages.
6. *Work and Labor; Contract; Substantial Performance; Quantum Meruit.*—Where a substantial part of the work under the contract had been completed and accepted, the person doing the work is entitled to recover thereon on a quantum meruit, and the other party sustaining no damage from the failure to complete, the person doing the work is entitled to the full reasonable value thereof.

APPEAL from Coffee Circuit Court.

Heard before Hon. H. A. PEARCE.

Action by R. D. Cook against the Henderson-Boyd Lumber Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Action on the common counts for work and labor done. The contract was in the shape of a letter, and was as follows: "R. D. Cook, Montgomery, Ala.: Confirming conversation with our Mr. Boyd, we will give you contract for twelve or fifteen miles of railway, paying you three hundred and fifty dollars per mile, three hundred of which is to be paid as each mile is accepted by us, if you so desire, and other fifty dollars to be held back, per mile, until contract is completed. This fifty dollars held to guaranty completion of work. Work will consist of taking up track from where it is now laid, laying it, and surfacing, same to be accepted in mile sections. We to furnish locomotive, cars and en-

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gincer. For any new grading that is necessary for you to do, will pay you 12 1-2 cents per yard. Grubbing to be done governed by our present specification. For treastling or timber work we pay you actual cost plus 10 per cent. For 12,000 cross-ties or more furnished by you, 10 cents each delivered, we to furnish the timber. Said ties to be eight feet long and to show six inches face on both sides, and three inches heart on both sides. This work to begin not later than the 20th of the month, and to be completed in seventy-five days. April 13th, 1905." The modifications and the other facts sufficiently appear in the opinion.

The plaintiff testified that he was a railroad contractor of several years' experience, had built much railroad, and that old grading consisted of work on any part of the track on which dirt had been broken, or on which any grading had been done; that new grading consisted in work on a line on which no dirt had been broken; that old grading was very much more expensive than new grading, for the reason that the top soil had been removed; that surfacing consisted in leveling the track after it was laid on the cross-ties, filling in between the cross-ties with dirt, and generally placing the track in condition after the rails had been laid. Grading consisted in getting the roadbed ready for the laying of the cross-ties and rails. The defendant objected to each part of this testimony, and moved to exclude it. The court overruled the motion, and the defendant excepted. The plaintiff also testified, over the objection of the defendant, that all the extra items of work he did and included in his account were necessary items, and that with items of this kind it is the custom of railroad contractors to charge on the force account, which is actual cost, plus 10 per cent.

The plaintiff requested the court to give the following charges: (1) Affirmative charge. (2) "If the jury believe the evidence in this case they must find for the plaintiff for not less than \$391.61, with interest." And to giving of these charges the defendant excepted.

The defendant requested the following charges, which were refused by the court: "If the jury believe that at the time the plaintiff stopped work on said railroad, on

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or about July 15, 1905, there was an existing contract between him and the defendant in regard to the matters upon which the suit is brought, then, unless the jury find from the evidence that the plaintiff has complied with the contract in its every term before bringing this suit, he is not entitled to recover anything. (2) The court charges the jury that unless they believe from the evidence that the plaintiff has complied with every term of his contract with the defendant, if they believe there was such a contract, at the time plaintiff stopped work on the said railroad, then Cook is not entitled to recover anything. (3) The court charges the jury that if the plaintiff did not cut the 12,000 ties as stipulated in the contract, and the defendant has never in any way released him from this term of the contract, then the court charges the jury that the defendants are entitled to retain the \$50 per mile of track completed by the plaintiff as stipulated damages. (4) If the jury believe from the evidence that the contract introduced in evidence was in force and had not been abandoned by agreement by both parties, at the time plaintiff stopped work in July, and that the plaintiff has not complied with every term of said contract, then the defendant is entitled to retain \$50 for each mile of completed road, and is not required to prove actual damages."

There was judgment for plaintiff for \$488.22, and defendant appeals.

RILEY & WILKERSON, for appellants.—The testimony was insufficient to prove a custom among railroad contractors as to old grading.—2 Parson's Contracts (9th Ed.) 694, 697; *Smith & Co. v. Rice*, 56 Ala. 423. The custom attempted to be shown was not brought home to the defendants, nor was it shown to be of such a character as that the law presumes knowledge of it on their part.—*Smith & Co. v. Rice, supra*; *Herring, et al. v. Skaggs*, 73 Ala. 446; 2 Parson Contract (9th Ed.) 694. Counsel discuss other assignments of error, but cite no authority.

HILL, HILL & WHITING, for appellee.—It being shown that Boyd, defendant's manager, was experienced in railroad construction and in building tram roads, he

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was charged with the knowledge of custom obtaining; and the court did not err in admitting the testimony of Cook and Hannon.—*Smith v. Rice*, 56 Ala. 417; *Sheffield Furnace v. Hull Coke Co.*, 101 Ala. 464. The fact that appellee and appellant did not say to each other in so many words that the contract was abandoned cannot effect the result. Their acts must be looked to before their intention.—*Roberson v. Bullock*, 66 Ala. 554; 2 Mayf. Dig. 798; Clark on Contracts, p. 611. There was no conflict in the evidence brought about by Boyd's testimony.—*Peters v. Southern Ry. Co.*, 135 Ala. 536. The agreement to retain the \$50.00 per mile was, at most, a penalty.—*Keable v. Keeble*, 85 Ala. 552; *McPherson v. Robinson*, 82 Ala. 459.

SIMPSON, J.—This was an action brought by the appellee (plaintiff) against the appellant (defendant); the complaint containing only common counts on account and for work and labor done and materials furnished. According to the testimony of the plaintiff, he entered into the written contract set out, but, when he appeared at the appointed place on the day on which he was to begin work, he found that he did not have men enough to do the work, and requested the general manager of the defendant "to work his hands and pay them until he could get men enough to start on the contract," and about three or four weeks afterwards "he and the defendant \* \* \* had an agreement by which the defendant agreed to take part of the work and do it, agreeing to take up and relay the track of the railroad, which the defendant proceeded to do, and the plaintiff to do the surfacing of the same." And under this agreement the plaintiff continued to work until he quit in July, 1905. He testified that it was subsequently agreed that he was to have \$127.50 per mile for the surfacing; that he surfaced 9 3-5 miles, and performed other work and furnished cross-ties, making the total amount of \$2,408.63, to which he was entitled, on which he has been paid \$1,919.71, leaving a balance due of \$488.92.

It will be observed that the plaintiff's testimony does not claim that the original contract was even abrogated, or substituted by a new contract, but was only

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modified in one particular, to-wit: In place of "taking up track, \* \* \* laying it, and surfacing," and receiving \$350, per mile, the plaintiff was simply to surface it and receive therefor \$127.50 per mile. This does not differ materially from the defendant's testimony in regard to the transaction, and it is admitted that the work was not completed. The contract provided that plaintiff was to be paid 12 1-2 cents per yard for new grading, and plaintiff claims that he quit work because he was doing some other grading, and defendant was not willing to allow him more than 12 1-2 cents per yard, and that old grading is more expensive than the new grading; while the defendant claimed that old grading was much easier than new grading, and that it was really included in the "surfacing" which plaintiff was to do. Whichever contention may be correct on that point, plaintiff's remedy was not to abandon the contract. Plaintiff admitted that he had not completed the work called for in the original contract. The "old grading" was either included in the contract, or it was not. If it was, the plaintiff should have gone on with the work; if it was not, and it became necessary to do it, in order to complete the work contracted for, the plaintiff, on the completion of the work, would be entitled to additional compensation for whatever that work was reasonably worth. Or, if he did not wish to perform it himself, and his work of surfacing could not be done until said grading was done, he might demand of the defendant to have it done in order that he might go on with the surfacing.

It was legitimate to prove, by those acquainted with the doing of that class of work, what the word "surfacing" meant, and whether it included such grading as was necessary in this case; and it was proper, also, to prove what was the custom in regard to the construction companies doing that class of work, and what the customary charges were for doing it, if additional charge was permitted. The evidence sought to be introduced to establish the custom was at least "some proof conducing to show such custom," and whether it was sufficient or not was a matter for the consideration of the jury, under the instructions of the court. Hence it was

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properly admitted.—*Steele v. McTyer's Adm'r*, 31 Ala. 667, 676, 70 Am. Dec. 516; 12 Cyc. p. 1102; *Haas v. Hudmon*, 83 Ala. 174, 176, 3 South. 302.

The terms of the contract show conclusively that the \$50, which was to be retained by the defendant, was a penalty "to guaranty completion of the work, and not liquidated damages.—*McPherson v. Roberts*, 82 Ala. 459, 462, 2 South. 333; *Keeble v. Keeble*, 85 Ala. 552, 5 South. 149. A substantial part of the work having been performed, and accepted, the plaintiff was entitled to recover therefor on a quantum meruit, but defendant would be entitled to retain so much of the 50 per mile as would equal the amount of damage resulting to it from the failure of the plaintiff to complete the work. No proof was made of any such damage.

Plaintiff testified to the amount of work done and the reasonable value thereof, which was not controverted, and defendant's own statement, in evidence, shows an indebtedness to the plaintiff, "leaving out of account the \$50 per mile which defendant has the right to retain." Hence there was no error in the giving of the charges requested by the plaintiff, nor in refusing the charges requested by the defendant.

The judgment of the court is affirmed.

TYSON, C. J., and HARALSON and DENSON, J.J., concur.

## Bay Shore Lumber Co., v. Donovan.

### *Assumpsit Against Surety.*

(Decided Dec. 20th, 1906. 42 So. Rep. 1014.)

*Principal and Surety; Condition of Liability.*—An instrument addressed to no one in particular, and signed by the defendant, stating that L. Bros., had contracted to build a house for defendant, and that any lumber used in its construction, to the amount of two hundred dollars, would be paid by the defendant at the time of first payment on house on presentation of

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an order from L. Bros., imposes no liability on the signer of the order where no order was obtained and presented before such first payment, and where the house was completed and L. Bros., paid in full before the signer of the instrument was informed that plaintiff had furnished any lumber.

## APPEAL from Mobile City Court.

Heard before Hon. O. J. SEMMES.

This was an action begun by appellant against Isaac Donovan and the individuals composing the firm of Luter Bros. The first count claims of the defendant \$196.84 due by account. The second count claims of the defendant the same sum for merchandise, goods and chattels sold by the plaintiff to the defendant, said Luter Bros., during the months of July and August, with the averments that the thing so sold were materials to be used in the construction of a house on Convent land 4 north of Spring Hill avenue, belonging to the defendant, Isaac Donovan, and that the materials were so used, and with the further averment, that before furnishing the material, plaintiff notified a member of the firm of Luter Bros., that he could not furnish said materials unless the defendant, Donovan, would be responsible for the payment thereof, whereupon plaintiff received an order for materials for the recovery of the cost of which this suit is brought. (Here follows the order set out in the opinion.) The tendencies of the evidence and the other facts necessary to an understanding of the opinion sufficiently appear therein.

INGE & ARMBRECHT, for appellant.—As to the construction of the contract attention is called to the following authorities.—9 Cyc. 587; 19 A. & E. Ency of Law (2nd Ed.) 285; *Nelson v. Manning*, 53 Ala. 549; *Comer v. Bankhead*, 70 Ala. 136; *Seay v. McCormack*, 68 Ala. 549; *Williams v. Glover*, 66 Ala. 189. Counsel discuss other assignments of error but cite no authority.

SULLIVAN & STALLWORTH, for appellee.—The contract being one of suretyship it must be strictly construed in favor of the surety and he has the right to insist upon the letter of all the material terms of the contract.—

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*Branch Bank v. Garrington*, 9 Ala. 549; *Evans v. Keeland*, *Ib.* 546; *City v. Hughes*, 65 Ala. 204; *Anderson v. Rawles*, 87 Ala. 336; *Crescent Co. v. Handley*, 90 Ala. 486; *May v. Alabama Bank*, 111 Ala. 513. Having once accepted a contract neither can hold the other to a different contract.—*Allen v. Mutual Co.*, 101 Ala. 574. There is a variance between the allegata and probata as to the second count.—*McAnnally v. Hawkins Lbr. Co.*, 109 Ala. 400.

In construing written instruments the *whole* instrument must be considered.—9th. Cyc. p. 579; *Ward v. Whitney*, 8 N. Y. 442; *Chesapeake, etc. Canal Co. v. Hill*, 15 Wallace 94; *Washburn v. Gould*, 29 Federal Cases No. 17, 214; 2 Mayfield's Digest, p. 757; *Pollard v. Maddox*, 28 Ala. 321; *Comer v. Bankhead*, 70 Ala. 136; *Mason v. Iron*, 73 Ala. 270.

Effect must be given to each clause and word if any reasonable effect can be given thereto.—*Hunter v. McCraw*, 32 Ala. 518; *Hollingsworth v. Fry*, 4 Dallas 345; 12 Federal cases, No. 6,619; 2 Mayfield's Digest, p. 758; *Brush Co. v. Montgomery*, 114 Ala. 433.

In a complaint upon a written instrument, if the plaintiff elects not to set out the instrument in full, he must set out the legal effect or substance of the whole instrument.—9 Cyc. 713; *Berry v. Kowalsky*, 95 Cal. 134; *Adams v. Davis*, 16 Ala. 748.

If he fails so to allege, the proof of an instrument materially different from that alleged works a variance between *probata* and *allegata*.—9 Cyc. 749; *Roneyn v. Sickles*, 108 N. Y. 650; *Leatherbury v. Spotswood, Turner & Co.*, 39 So. 588.

TYSON, C. J.—Plaintiff's right of recovery in this case, upon the second count of the complaint, confessedly is dependent upon the construction of the written instrument, addressed to it and signed by defendant, upon the faith of which the lumber was furnished to Luter Bros. to be used by them in the construction of the house. It is in this language: "This is to certify that Mess. Luter Bros. has contracted to erect a frame house for me on the Convent Land, 4 North Spring Hill Avenue, and any material, that is, lumber used in



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its construction to amount of \$200 will be paid for by me at time of first payment on house, on presentation of order from them. (Signed) Isaac Donovan."

It appears to us that it is obvious that this writing contains no promise to pay any certain sum of money at all events and at a fixed time. It is, therefore, not a promissory note; nor is it a contract binding Donovan absolutely to pay the plaintiff \$200 at the date of the maturity of the first payment under the building contract with Luter Bros. It is no more than its plain language imports—a promise by Donovan to pay to plaintiff, upon Luter Bros.' order, at the maturity of the first payment under the building contract, a sum of money not to exceed \$200. It is, therefore, a conditional promise, and not an absolute one; the condition being that plaintiff would obtain an order from Luter Bros. for lumber furnished and used in the construction of the house, not to exceed \$200, and present the same to Donovan before the first payment was made by Donovan to Luter Bros. under the contract. The testimony establishes that plaintiff in no wise complied with the condition upon which Donovan's promise to pay was predicated. Nor does it afford in the remotest degree an inference that plaintiff was induced by word or act on the part of Donovan to part with its lumber other than upon the paper writing above set forth. If the plaintiff has lost the value of the lumber on account of the insolvency of Luter Bros. or otherwise, this is no fault of Donovan's. It could have, before delivering the lumber to Luter Bros. obtained the order requisite to a compliance with the condition named by him. Their failure to do so was their own neglect. And, upon failure to obtain and present the order before the first payment to Luter Bros. matured, Donovan, with no knowledge that the lumber had been furnished, had the right to discharge his obligation to Luter Bros. under the contract. In short, "a contract of suretyship is essentially a promise to answer for the debt, default, or miscarriage of another. \* \* \* The contract is strictly construed as to his liability, and cannot be extended to any other person, or any other subject, or to or for any other period of time, than such as may be included in its

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words."—*City Council of Montgomery v. Hughes*, 65 Ala. 204. Indeed, the testimony shows that Donovan was never informed that plaintiff had furnished any lumber until after the house was completed and he had paid Luter Bros. in full.

Affirmed.

DOWDELL, ANDERSON, and MCCLELLAN, JJ., concur; the concurrence of DOWDELL and MCCLELLAN, JJ., being as to the conclusion.

## Glennon v. Harris.

*Assumpsit.*

(Decided Jan. 16th, 1907. 42 So. Rep. 1003.)

1. *Trusts; Liability of Trustee; Limitations.*—The executor of an estate agreed with a legatee under the will to pay her legacy in installments of ten dollars each per month, and thus created an express trust between them as to the fund. The executor paid two hundred dollars in such installment, and through mistake failed to pay the balance of the legacy. Held, the statute of limitations for six years did not begin to run against the claim for the balance, until after demand and refusal to pay.
2. *Same; Trust Relation of Executor to Legatee; Discharge as Executor; Legacy Unpaid.*—The final settlement by an executor of his accounts and his final discharge did not change the trust relation as between him and the legatee, as to the amount of the legacy remaining in his hands; nor did the payment by him of the amount of the legacy remaining in his hands to the residuary legatees, through a mistake, alter his trust relation to the legatee.

APPEAL from Mobile Circuit Court.

Heard before Hon SAMUEL B. BROWNE.

Action by Mary Harris against James K. Glennon. Judgment for plaintiff, and defendant appeals. Affirmed.

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GAILLARD & MAHORNER, for appellant.—The plaintiff's right to maintain a common law action for the legacy could only be supported by proof of assent to the legacy by the executor.—Sec. 344, Code 1896; *Bonner v. Young*, 68 Ala. 35; *Cox v. McKinney*, 32 Ala. 465. The demand, if it accrued at all, accrued more than eighteen months after the will was probated.—*Walker v. Johnston*, 82 Ala. 347; *Horton v. Averytt*, 20 Ala. 719; *Cox v. McKinney*, *supra*. The statute of limitation then began to run not later than March 26, 1896.—*Wood v. Wood*, 3 Ala. 756; *Walker v. Johnson*, *supra*; *S. A. & M. R. R. Co. v. Buford*, 106 Ala. 303; *Underhill v. Mobile F. D. I. Co.*, 67 Ala. 45. The court erred in its oral charge to the jury.—*Gerald v. Tunstall*, 109 Ala. 567; 4 Mayf. 486. Where ignorance and want of knowledge induced by fraud, silence or misrepresentation is set up as an exception to the statute of limitation it must be fully pleaded and pleadings must disclose that the party pleading same was not in fault because of ignorance or for want of proper diligence.—*James v. James*, 55 Ala. 525; *Scruggs v. Decatur*, 86 Ala. 173; *Manning v. Pippen*, 95 Ala. 538.

L. H. & E. W. FAITH, for appellee.—There was a trust relation between Glennon and Mrs. Harris and until there is a settlement of the trust or an open unmistakable repudiation of it it cannot be regarded otherwise than as subsisting.—*McCarthy v. McCarthy*, 74 Ala. 553; *Custer v. Murray*, 5 Johnson's Chancery, 522; *Mullen v. Walton*, 39 South. 97. That this was a trust see the case of *Whetstone v. Whetstone*, 75 Ala. 495. The evidence discloses a fraud practiced upon appellee.—*Mullen v. Walton*, *supra*; *Porter v. Smith*, 65 Ala. 169; *Henry v. Allen*, 93 Ala. 197; *Tillison v. Ewing*, 87 Ala. 350.

DOWDELL, J.—The principal question and chief contention in the case, and the one on which the cause may be finally determined, is based on the plea of the statute of limitations of six years. The complaint contained the common counts, embracing the count for money had and received for plaintiff's use and benefit.

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The undisputed facts show that the plaintiff, appellant here, as executor of the last will and testament of Amelia Durand, deceased, received and held in his hand \$300, which was left as a legacy to the plaintiff, appellee here, by said Amelia Durand under her said last will. The defendant, James K. Glennon, was nominated in said will as executor and without bond. He qualified as such executor and took possession of the assets of the estate. The plaintiff was an ignorant and illiterate colored woman and former servant in the family of testatrix. She knew that Mrs. Durand left a last will but did not know its contents. The defendant, Glennon, informed the plaintiff that the amount of the legacy left the plaintiff under the will was \$200. The defendant paid plaintiff the \$200 in installments of \$10, for which he took receipts from plaintiff. In March, 1896, defendant made final settlement of his executorship in the probate court. The defendant testified that at the time of making final settlement of his executorship he sent for the plaintiff and informed her that he had paid her \$200, all that was coming to her under the will, and that, as he had lost one of her receipts for \$10, he wanted her to give him a receipt for the \$200 paid, to file as his voucher on the settlement. The defendant further testified that he paid the \$200 to the plaintiff in installments of \$10 a month, and that he kept the legacy and paid it to the plaintiff in installments by the month at plaintiff's request. The defendant further testified that he made a mistake in informing the plaintiff that her legacy under the will was \$200 instead of \$300, and that under this erroneous impression of his as to the amount of the legacy, on the final settlement, he paid the remaining \$100 over to the residuary legatee under the will. It is shown that the plaintiff did not learn that the legacy left her under the will was \$300 until within a month or two before the commencement of this suit, when she made demand on the defendant for the balance of her legacy, the \$100, and the defendant refused to pay the same.

If an express trust was created by the agreement of the defendant to retain the legacy and pay it over to the plaintiff in monthly installments of \$10, then the

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statute of limitations would not begin to run against the demand until there was a clear disavowal of the trust by the trustee, and such disavowal brought to the knowledge of the cestui que trust. Here there was no such disavowal, but, on the contrary, a recognition of it until the defendant had paid over to the plaintiff \$200 in installments, and the failure to pay over the remaining \$100 was the result of the defendant's erroneous impression, as he claims, that the legacy was \$200. The defendant's erroneous impression as to the amount of the legacy could not change the trust relation between the parties. In *Taylor v. Benham*, 5 How. (U. S.) 233, 274, 12 L. Ed. 130, Mr. Justice WOODBURY, speaking for the court said: "So every person who receives money to be paid to another, or to be applied to a particular purpose, to which he does not apply it, is a trustee, and may be sued either at law, for money had and received, or in equity, as a trustee, for a breach trust." And in that case it was held that the statute of limitations did not commence to run until there was a demand and refusal to pay. On somewhat analagous facts it was held in *Coster v. Murray*, 5 Johns, Ch. (N. Y.) 522, 531, that an express trust was created, and the statute of limitations did not run. See *Perry on Trusts*, (5th Ed.) § 863. In *Hastic & Silver v. Aiken*, 67 Ala. 313, a sum of money which was deposited in bank to be under the management of a certain firm was held to be funds of an express trust against which the statute did not run. In *Whetstone v. Whetstone*, 75 Ala. 495, on the death of an ancestor leaving a will, of which one of his sons was executor, a final settlement was made by the executor of the estate, and he then assumed, with the consent of his sister, to receive, hold, and manage her share of the estate as her agent and trustee. It was held to be an express continuing trust, against which the statute did not run.

The appellant here assumed, with the consent of the appellee, to hold her legacy for her as her agent or trustee, and to pay it out to her in small monthly installments. The relation of the parties was not that of ordinary debtor and creditor. No interest was chargeable against the defendant until on a demand and refu-

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sal to pay. The defendant in the first instance as executor occupied a fiduciary relation to the plaintiff as to the legacy, and when he agreed with the plaintiff to hold the legacy in his hands and pay it to her in monthly installments of \$10, an express trust between plaintiff and defendant was thereby created as to the fund. It was, in effect and in law, the same as if the plaintiff had deposited that amount of money in the hands of the defendant, to be held and paid to her in monthly installments. The subsequent final settlement by the defendant in the probate court of his accounts as executor, and his final discharge as such executor, did not and could not in law change his trust relation as to the amount of plaintiff's legacy at the time remaining in his hands; nor did the payment by him of this amount over to the residuary legatee through a mistake alter his trust relation to the plaintiff. On the defendant's own testimony and the undisputed facts in the case, we are of opinion that the statute of limitations of six years, as a defense to the action, is without merit, and the plaintiff was entitled to have the general affirmative charge given in her favor. And, this being true, error, if any, committed by the court against the appellant in the oral charge of the court, or in the given charges for the appellee, was error without injury.

Affirmed.

TYSON, C. J., and SIMPSON and ANDERSON, JJ., concur.

## Murray & Peppers v. Dickens.

*Assumpsit.*

(Decided Dec. 20th, 1906. 42 So. Rep. 1031.)

1. *Evidence; Books of Account; Authentication.*—Entries on books of account are admissible as against the objection that the book was not regularly kept in the usual course of business,

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where it was shown that a steam holster was rented at a specific sum per day, and the owner thereof made entries on the book kept for that purpose of the number of days the holster worked, based on reports made to him at the end of each week by his employee in charge of the holster.

2. *Same*.—The testimony showed that the owner of the holster, which was rented for a specific sum per day, made entries on a book kept for that purpose of the number of days the holster worked each week, based on the report of his employee in charge of the holster. The employee, in charge of the holster, testified that he made true reports every Saturday to the owner who entered the same at once in the book. Held, the entries were sufficiently corroborated by independent evidence, to render them admissible.
3. *Same*.—Entries regularly made by a party in a book kept for that purpose, from data furnished by an employee, where the employee testified that he knew of the correctness of the items and gave them correctly to the party entering them, and the party entering them testified that he entered the items as they were given to him, are admissible.
4. *Same*.—The entries above referred to in headnotes 1, 2 and 3 were admissible against the objection that the entries were not made contemporaneously with the transaction, they being made within a reasonable time, under the circumstances.
5. *Same*.—Under the contract, it being for the court to decide whether the holster, when the employee had steam up waiting for directions to use it, was in service within the contract, (and if not other testimony might be introduced on which the jury could ascertain what should be deducted from the amount shown by the entries) entries made as set out in the above headnotes, were admissible in evidence.

APPEAL from Mobile Circuit Court.

Heard before Hon. SAMUEL B. BROWNE.

Action by Murray & Peppers against Charles C. Dickens. From a judgment for defendant, plaintiffs appeal. Reversed and remanded.

WILLIAM C. FITTS, and DAVID H. EDDINGTON, for appellant.—The book was a book of original entry in contemplation of law.—*Post v. Kennelston*, 52 L. R. A. 577; *Tilkins v. Baker*, 6 Lans. 516; *Reddish v. Bauerlee*, 38

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Am. Rep. 87; *Jeffries v. Urmy*, 3 Houst. 653; *Curtis v. Bradley*, 38 L. R. A. 144; *Bolling v. Fannin*, 97 Ala. 619; *Alabama Construction Co. v. Wagnon Bros.*, 137 Ala. 389. For further discussion of the subject of the admissibility of the entries, see 102 N. Y. 572; 22 N. Y. Sup. 148; 1 Greenl. (16th Ed.) pp. 206-211.

GREGORY L. and H. T. SMITH, for appellee.—The entries in the book are not admissible because not made in a set of books regularly kept in the usual course of business; because not corroborated by independent testimony of a person knowing the facts; and because the person making the entries had no personal knowledge of their proof.—*Dismukes et al. v. Colson, et al.*, 67 Ala. 388; 1 *Natl. Bank of Talladega v. Chaffin*, 118 Ala. 260; *Wager Lbr. Co. v. Sullivan Co.*, 120 Ala. 573; *Lane v. Mayor & Thomas Hdw. Co.*, 121 Ala. 298. A party cannot bolster up the testimony of their witness by the testimony of their good character and it cannot be shown by introducing evidence as to how long he remained in any particular employment.—*Gipson v. The State*, 89 Ala. 121; *Funderberg v. The State*, 100 Ala. 36; *M. & G. Ry. Co. v. Williams*, 54 Ala. 68; *Bell v. The State*, 124 Ala. 94. The defendant not being a witness its character cannot be attacked.—*Harrison v. The State*, 37 Ala. 154.

SIMPSON, J.—This was an action by the appellants (plaintiffs) against appellee (defendant) on the common counts, to wit: (1) Open account; (2) account stated; (3) work and labor done; (4) merchandise, goods, etc., sold; (5) money paid for defendant; (6) money received by defendant for the use of plaintiffs. And the pleas were the general issue and payment. The matter for which plaintiffs claimed that defendant owed them the amount sued for was for the use of a "steam hoister," which it is claimed did service for defendant under an agreement by which he was to pay \$10 per day.

A witness for plaintiffs, Edward Peppers, who was a member of the plaintiff's firm, testified that plaintiffs



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did in September, 1903, rent the "steam hoister" to defendant; that defendant was to pay \$10 per day; that defendant, Dickens, was to give plaintiffs a statement each Saturday night as to how much the "hoister" had worked during the week; that defendant had been asked frequently for the statement, but had never given any, except a little slip, once, with no date on it; that witness did not see the hoister worked, as it was 10 or 12 miles from Mobile; that plaintiff became dissatisfied because of Dickens' failure to furnish the statement, and changed the terms to a regular renting agreement, but this suit is for the amount due before this change was made; that the hoister was a barge, with a steam engine on it, and was used for pulling logs out of the woods; that plaintiff's engineer, Bill Steadham, had charge of the hoister; that he left Mobile with it every Sunday evening or Monday morning and returned Saturday evening, at which time he would report to witness verbally the number of days that the hoister had been worked during that week, and witness would set the amount down in the book (which is offered in evidence); that plaintiffs were paying said Steadham according to the time he worked, and they paid him according to the amounts so set down in said book, and they allowed a half day each week for going to and returning from defendant's place—thus, if he reported 5 days' work they paid him for 5 1-2 days. He also stated that the boat remained through the week at defendant's place, subject to his orders. Bill Steadham testified to the same arrangement; that he made true reports every Saturday night to Mr. Peppers, who entered it at once in the book; also that he would call on Dickens for statements of the work done, but that he never gave but the one, and would tell him that his (Steadham's) word was as good as his (Dickens); that he knew exactly how many days he worked and how many he lost each week, and so reported it; that when he had steam up, under orders, at Dickens' place, he reported it that way; but witness later stated that sometimes Dickens did not come down to work till late in the day, but, if witness had steam up all day, he reported that as a day's work.

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The defendant objected to the introduction of said book in evidence, on the ground that it had not been proved, which objection was sustained, and the book was excluded; and the court then, on motion of defendant, excluded all of the plaintiff's evidence, because it was irrelevant and immaterial, and gave the general charge in favor of the defendant. The chief point of controversy is the action of the court in ruling out the book as evidence and then excluding all of plaintiffs' testimony. The appellants insist that there was error in this action of the court, and the appellee sustains the action, because (1) the book was not regularly kept in the usual course of business; (2) the contents was not corroborated by independent testimony of a person knowing the facts; and (3) the person making the entries did not himself have personal knowledge of their truth.

As to the first objection, the testimony of Peppers shows that the entries were regularly made in a book kept for that purpose, on the reports which were made, in accordance with the requirements of the contract; and, as to the second, the entries are corroborated by the testimony of Peppers and Steadman. As to the third exception, while it is true that the expression is found in the authorities that the person making the entry must have knowledge of the correctness of the item, yet it will be found that in those cases there was no proof by any one else of the correctness of the item, and it would seem, on reason, that if one party testifies that he knew of the correctness of the item and gave it correctly to the other, and the other testifies that he entered it as it was given to him, that that would amount to the same thing as if the party who made the entry should swear that he knew of the correctness of the item. So it is laid down that "entries made by a party from data furnished, or memoranda kept by an employe to assist his memory in making a report or return will be admissible, if supplemented by the oath of the party and the testimony of the servant making the memoranda or furnishing the information."—17 Cyc. 386; *Miller v. Shay*, 145 Mass. 162, 13 N. E. 468, 1 Am. St. Rep. 449;

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*Smith v. Law*, 47 Conn. 431; *Harwood v. Mulry*, 8 Gray (Mass.) 250; *Barker v. Haskell*, 9 Cush. (Mass.) 218; *Morris v. Briggs*, 3 Cush. (Mass.) 342; *Smith v. Sanford*, 12 Pick. (Mass.) 139, 22 Am. Dec. 415; *Hoover v. Gehr*, 62 Pa. 136; *Post v. Kenerson*, (Vt.) 47 Atl. 1072, note 52 L. R. A. 578, 82 Am. St. Rep. 948; *Curtis v. Bradley*, (Conn.) 31 Atl. 591, 28 L. R. A. 143, 48 Am. St. Rep. 177; *Bay v. Cook*, 22 N. J. Law, 343, 355. The book in this case was not subject to this objection.

It is next insisted that the book was properly excluded, because the entries were not made contemporaneously with the transaction. In the case of *First National Bank of Talladega v. Chaffin*, 118 Ala., pages 246, 260, 24 South. 80, referred to by counsel for appellee, the books offered in evidence were the ledgers of a deceased party, and there was no proof as to who kept the books, nor as to whether they were correct, or whether original entries or not, and the court very properly said that the books should have been excluded, because said books did not appear prima facie, nor were they shown by evidence to have been, original entries made contemporaneously with the sales and payments noted in them. The question as to how near in point of time an entry may be made, so as to come within the rule as to being contemporaneous, is not presented at all in that case. The case of *Dismukes & Patrick v. Tolson & Barrett*, 67 Ala. 388, 389, went off entirely on the point that the witness could not testify to the correctness of the books, because it involved a transaction with a deceased party, and the remarks of the court were made to the point that under the facts in the case the books would have been admissible if the witness had been competent. In the case of *Horton v. Miller*, 84 Ala. 537, 540, 4 South. 370, the witness T. G. Miller made the entries, and J. P. was not put on the stand to prove the correctness of the items. The court properly held that the book was not admissible as to those items. In the case of *Stoudenmire v. Harper Brothers*, 81 Ala. 242, 245, 1 South. 857, the memorandum sought to be introduced was not an original entry, nor even a copy

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of the entries on the books, but merely an addition by the witness of certain items which he had taken from the books, and the court said: "The original must be produced, and must have been made at or near the time of the occurrence." In the case of *Wagar Lumber Co. v. Sullivan Logging Co.*, 120 Ala. 560, 573, 24 South. 949, the only points decided were that the witness could not refer to a memorandum made by another party when he had no knowledge of its correctness, and that a book could not be introduced when there was no proof of the correctness of the items, nor that they were made "at or about the time at which the facts to which they relate transpired." The case of *Lane v. May & Thomas Hdw. Co.*, 121 Ala. 296, 298, 25 South. 809, merely holds that a memorandum book could not be introduced in evidence when there was no proof that the items were entered "at or about the time the payments were made, nor sufficiently that the witness knew the entries to be correct when they were made."

So there is nothing in our decisions contrary to the general principle laid down, to wit, that, while the entries must be made at or near the time of the transaction, yet no precise time is fixed by law when they should be made. The entry need not be made exactly at the time of the occurrence; but it is sufficient if it be made within a reasonable time. In this particular every case must be made to depend upon its own peculiar circumstances, having regard to the situation of the parties, the kind of business, the mode of conducting it, and the time and manner of making the entries. An entry once a week has been held to be sufficient.—*Yearsley's Appeal*, 48 Pa. 531; note to *Post v. Kenerson*, 52 L. R. A. 583; McKelry on Evidence, pp. 251, 252, § 175. It must be admitted that the cases are in some confusion on this subject, but from an examination of them the above seems to be a reasonable deduction. There are a number of cases where loose memoranda were first made, and then afterwards transferred to a permanent book, and the general trend of decisions is that the loose memoranda are not the entry, but mere helps to the party to remember, and the entry in the permanent

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book is the original entry, so that it seems that the rule would be the same, whether there were any memorandum or not. In those cases it is held that, in order to admit the entries in the book, it is necessary, not only that the party who made the entry shall swear that the entry was made in accordance with the memoranda, but also that the party who made the memoranda, should testify to the correctness of the memorandum when he made it. This testimony we have in the case now under consideration. It is also held in a number of them that unless some reason is shown why the entry was not made in a day or two, either from the nature of the business or otherwise, the entry will not be deemed to be contemporaneous within the meaning of the law; but the cases recognize that circumstances may be such as to justify the delay in making the entry for as long a time as a week.—*Redlich v. Bauerlee*, 98 Ill. 134, 38 Am. Rep. 87; *Kent v. Garvin*, 67 Mass. 148; *Vicary v. Moore*, 2 Watts (Pa.) 451, 27 Am. Dec. 323; *Forsythe v. Norcross*, 5 Watts (Pa.) 432, 30 Am. Dec. 334. As stated in the *Redlich Case*, *supra*: "It suffices if it be within a reasonable time so that it may appear to have taken place while the memory of the fact was recent, or the source from which knowledge of it was derived is unimpaired." So, considering the nature of the business in this case, the fact that the boat made weekly trips and there was no opportunity to make the entries until the report came in at the end of the week, that the contract itself provided for weekly reports, and that the service was such as could be easily remembered for that period, we hold that the entries were made within a reasonable time, and admissible.

There is nothing in the suggestion that the entire book was offered in evidence, and not only those entries relating to this matter, as, in the first place, the book was offered only to prove these items, and there is no evidence that there was anything else in the book, and, in the next place, the only objection offered to it was that "it had not been proved at all." Nor is there any force in the suggestion that the report of Steadham was

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of his own time, and not of the time that the boat worked; for both he and Peppers state that his report was of the time the boat worked, and it is shown that the report did not include the half day which was allowed Steadham for going and coming. On the contrary, Peppers states distinctly "that, if he reported the machine worked 5 days, they paid him for 5 1-2 days, and so on." Even if the half days were included it would be an easy matter to deduct them. So with regard to the suggestion that Steadham reported it as a day's work when he had steam up all day waiting for Dickens, though Dickens did not actually get to work until the middle of the day or later. If the boat was there subject to his orders, and he did not actually use it, it would be a question for the court to decide whether it was not there in his service, within the meaning of the contract; and, even if it was not, that would not be any reason for rejecting the evidence, but other testimony could be introduced, from which the jury could ascertain what should be deducted. The court erred in excluding the book, and in excluding the evidence of the plaintiff, and in giving the general charge in favor of the defendant.

The judgment of the court is reversed, and the cause remanded.

TYSON, C. J., and HARALSON and DENSON, JJ., concur.

## Norton v. Clayton Hardware Co.

*Assumpsit.*

(Decided March 2, 1907. 43 So. Rep. 185.)

1. *Compromise and Settlement; Composition in Writing.*—A creditor wrote his debtor offering, after being forced into bankruptcy, fifteen per cent in full settlement of his claim, which offer was accepted, the creditor instructing the bank, to whom the claim had been sent, to receive fifteen per cent in settle-

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ment; and the debtor sending check to the bank for that amount, the bank collected check, and marked claim paid. Held, that it was a composition of the debt in writing, and binding under Section 1806, Code 1896.

2. *Same; Fraudulent Representations.*—The debtor wrote a creditor offering fifteen per cent in full settlement of the claim, stating that he was making same offer to all his creditors, which was a fact. The creditor accepted the offer. Held, a valid composition with that creditor, although some creditors insisted on a larger dividend and got it.

APPEAL from Barbour Circuit Court.

Heard before Hon. A. A. EVANS.

Action by the Clayton Hardware Company against J. H. Norton. Judgment for plaintiff. Defendant appeals. Reversed and remanded.

A. A. McDONALD, for appellant.—The facts in this case bring the settlement clearly within sections 1805-1806, Code 1896.

T. M. PATTERSON, for appelle.—The check offered in evidence cannot be taken to show a settlement of the account in full.—*Hodges v. Tennessee Implement Company*, 123 Ala. 572. In a composition there is an implied agreement that all should share alike.—8 Cyc. pp. 468 and 476. In any event the facts show that the composition was obtained by fraud or misrepresentation.—*Cleere v. Cleere*, 82 Ala. 581; *Coran v. Sapp*, 74 Ala. 44.

SIMPSON, J.—This was a suit by appellee against the appellant on an account, and the defense interposed was that said plaintiff had agreed with defendant to accept 15 per cent. of the claim in full satisfaction, which amount said defendant paid. Said composition was made by letter. The letters were not produced; the witness (defendant) stating that they had been destroyed and testifying to the contents of them, to-wit, that he wrote to plaintiff, after being forced into bankruptcy, offering to pay 15 per cent. in full settlement of the indebtedness, and defendant replied, accepting the offer, and he sent them a check for that amount, which

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check was paid. The cashier of the bank also testified that the claim was sent to his bank for collection by the plaintiff; that he received a letter from the plaintiff, instructing him to receive the 15 per cent. in full satisfaction of the claim; and that, when the check came in, he stamped the account "Paid." If this testimony was true, the facts related constituted a composition of the debt, and the plaintiff could not recover.—Code 1896, § 1806; *Singleton, Hunt & Co. v. Thomas*, 73 Ala. 205.

One of the partners of the firm constituting the Clayton Hardware Company, the appellee, says that, while he did send the claim to the bank for collection, he does not recollect writing the letter authorizing the composition of the debt. But the appellee claims that, even admitting the truth of the plaintiff's testimony, the agreement was entered into with the understanding that the same settlement was to be made with each of the other creditors of the defendant. We find no such stipulation in the evidence. The only thing that was said about other creditors was that, in the letter by which the defendant offered the 15 per cent. compromise, he stated that "he was making that offer to every one." So, if some of them did insist on having more, and got it, that would not affect the validity of the agreement by which the claim of the plaintiff against the defendant was settled. It follows that the court erred in giving the general charge in favor of the plaintiff.

The judgment of the court is reversed, and the cause remanded.

TYSON, C. J., and HARALSON and DENSON, JJ., concur.



[Worthington v. McGarry.]

**Worthington v. McGarry.***Action on the Contract.*

(Decided Feb. 5th, 1907. 42 So. Rep. 988.)

1. *Brokers; Right to Compensation; Contract of Employment; Performance.*—It is not necessary that there should be an actual purchase of the property upon which options have been obtained, before the broker, who undertakes to obtain options on certain property for another, is entitled to his compensation therefor.
2. *Same; Rules of Construction; Language of Instrument; Intent of Parties.*—Where the contract stipulated that if the broker obtained the option at a price at which the purchaser may buy, it was the intention of the parties, and the meaning of the contract, that the option should be obtained at a price which was satisfactory to the purchaser, and the conditions of the contract were fully complied with when it was shown that the price was satisfactory to the prospective purchaser.
3. *Same; Failure to Perform; Direction of Principal.*—The parties to the contract agree that defendant would pay plaintiff a sum certain if the plaintiff would secure for defendant options on certain ore lands and on a majority of the stock of a named corporation. Plaintiff secured the ore land option at a price satisfactory to the defendant, but did not secure options on the stock of the corporation, but alleged and proved that he was prevented from doing so by the defendant. Held, Plaintiff is not entitled to compensation under the contract for securing the options on the ore lands.
4. *Same; Breach; Rights and Liabilities on Partial Performance.*—The broker has an action in damages for a breach of the contract, where the other party to the contract agrees to give him certain compensation to secure certain options, and afterwards direct him not to secure a part of said options.

APPEAL from Colbert Circuit Court.

Heard before Hon. E. B. ALMON.

Action by A. J. McGarry against J. W. Worthington. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

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The contract made the basis of the second count is as follows: "Florence, Ala., April 2, 1898. It being desirable that they co-operate in the matter of securing certain option leases, etc., on certain ore lands in the state of Tennessee, it is therefore, for value received from each by each, agreed between J. W. Worthington and A. J. McGarry, parties to this agreement, as follows: If the said McGarry shall, by himself or in connection with the said Worthington, secure for the said Worthington an option to purchase the majority of the stock of the Lawrence Iron Co.—that is, shall enable the said Worthington to secure an option on the stock of one McCormick, of the state of Pennsylvania—and shall further secure an option to purchase all of the ore lands of Herrin's heirs, said lands being situated at or near the town of West Point, Tenn.: Now, if the said McGarry should secure these options above described and at a price that the said Worthington may for himself or associates buy the property described herein, or intended to be described herein, then in that event the said Worthington shall pay to the said McGarry two thousand five hundred dollars, and the said Worthington shall pay to the said McGarry any and all legitimate expenses the said McGarry may incur in connection with the transaction herein described, whether the said Worthington shall purchase all or any part of said property. Executed in duplicate." The averments are that plaintiff did secure the option mentioned as provided in said contract, but the said Worthington failed and refused.

WILHOYTE & NATHAN, for appellant.—The contract was unilateral in its incipency and invalid until its performance by McGarry of the duties undertaken by him.—*Sheffield Furnace Co. v. Hull*, 101 Ala. 446; *American Oak Extract Co. v. Ryan*, 104 Ala. 267. The alleged verbal change of the contract does not relieve plaintiff of the conditions complained of therein and at the same time keep defendant bound thereby.—11 Cent. Dig. § 1139; *Randolph v. Perry*, 2 Port. 376; *Hunt v. Barfield*, 19 Ala. 117. An agreement is not binding on

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either party unless both are bound.—11 Cent. Dig. col. 35.

THOMAS R. and A. J. ROULHAC, for appellee.—No brief came to the reporter.

TYSON, C. J.—This is an action by the appellee against the appellant to recover for services rendered in procuring an option for the purchase of certain property. The complaint contains two counts. The first on an account stated; but, as no proof was offered in support of this count, it may be disregarded. The other count is on a written contract, under and by which the defendant agreed to pay plaintiff \$2,500 if the plaintiff should secure for him options on two properties mentioned (certain ore lands and the majority of the stock in a corporation named) "at a price that the said Worthington (defendant) may for himself or associates buy the property described." The count as amended alleges that the plaintiff procured the options, except as to the stock in the corporation, "which \* \* \* said defendant undertook to procure for himself." The proof showed that the plaintiff did procure an option upon the ore lands which was entirely satisfactory to defendant, though the lands were not, in fact, purchased, owing to the want of compliance by defendant with the terms of the option contract as to payment at the time stipulated. The evidence further showed that the defendant directed the plaintiff not to make any effort to procure the option on the stock, and that he undertook to do that himself, but failed. There was no proof as to the value of the services rendered by the appellant in procuring the option upon the ore lands. The court below having rendered judgment for the plaintiff, the defendant below appeals.

Two questions arise. The defendant insists, first, that the proper construction of the contract contemplated that there should be an actual purchase of both properties before the plaintiff could earn the \$2,500 stipulated to be paid. We cannot accept this construction as being what the parties intended and what they have expressed in writing. It was only options that the

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plaintiff was required to obtain, which are entirely distinct and separate from the actual purchase. Purchases, if made, are often, if not generally, made by third parties, to whom the party holding the option transfers his right. In this case the first part of the contract simply referred to obtaining an option, without any limitation. In such case the terms of the contract might be complied with if an option had been obtained at a price five times, or any number of times, greater than the actual value. The defendant, seeing, perhaps, that he might be called upon to pay \$2,500 for securing options which were utterly worthless to him, owing to the excessive price, wrote the second paragraph of the contract in relation to the price, saying that the option should be at a price at which he "may buy." This second term, if we construe it literally, would be very ambiguous, uncertain, and unreasonable, since the word "may" might simply refer to the permission of the vendor to sell, or it might refer to the state of the fortune of the party proposing to buy—in one event enabling the broker to claim his commission for obtaining an option at a price far in excess of the value of the property; in the other, enabling him to claim his commission if his employer had means enough to pay for the property, no matter at what price, on the option being obtained. Such constructions are inadmissible. What the parties intended was that the option should be obtained at a price which was satisfactory to the employer; and this, we think, was the intent and meaning of the contract under consideration. And in this case the option which was obtained upon the ore lands was entirely satisfactory to defendant, and, therefore, if that was the only question in the case, the compensation would have been earned under the contract.

But no recovery can be had upon a contract except in pursuance of its terms, and here the express condition was that the \$2,500 was to be earned only upon the obtaining of options upon two separate pieces of property. Plaintiff seeks to do this by averring that the defendant below undertook to procure the other option himself; and the proof shows that he did undertake to obtain it, and failed. This does not amount to a performance or waiver of performance. Of course, there might be a

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waiver of performance as to obtaining option on one piece of the property, and an agreement to pay the full compensation for obtaining the option as to the other; but there is no averment or proof of this, and the court is not at liberty to supply it. At most, the allegation and proof amount to a refusal on the part of the defendant below to allow the appellee to earn his compensation by obtaining the option on both pieces of property; that is, it is shown that the plaintiff below undertook to obtain the options, and did obtain one, and was prevented by the defendant in obtaining the other. There is no allegation and proof that the other option could have been obtained, or would have been obtained by the plaintiff, had he not been interfered with. The question, then, is simply this: Whether or not a party, entitled to a named consideration upon the performance of two services, can claim the compensation upon the performance of one of the services, alleging and proving that he was prevented in endeavoring to perform the other by the defendant. We think he cannot. The defendant, by directing the plaintiff not to proceed in reference to one of the services, altered and breached the contract. There was an implied term in the contract that the plaintiff should have an opportunity to perform both services, and, when his performance was prevented or dispensed with as to one, the contract was thereby set aside by the employer, and the plaintiff was relegated to a suit for damages for a breach of the contract or one on a quantum meruit for services actually performed.—9 Cyc. 638, 639; 7 Ency. Law (2d Ed.) 150-152; *Anvil Min. Co. v. Humble*, 153 U. S. 552, 14 Sup. Ct. 876, 38 L. Ed. 814; *The Eliza Lines*, 199 U. S. 119, 128, 26 Sup. Ct. 8, 50 L. Ed. 115; *Rhoelem v. Horst*, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953.

The plaintiff, upon a proper count, and upon proof of the value of his services in procuring the option as to the ore land, would have been entitled to recover; but it was error for the lower court to hold that under the written contract he was entitled to the price named therein for the obtaining of both options, when he only obtained one.

Reversed and remanded.

DOWDELL, ANDERSON, and McCLELLAN, JJ., concur.

[Stevens v. Bailey &amp; Howard.]

**Stevens v. Bailey & Howard.***Action for Commissions as Real Estate Brokers.*

(Decided Dec. 21, 1906. 42 So. Rep. 740.)

1. *Brokers; Action for Compensation; Complaint; Sufficiency.*—Where the complaint alleged that defendant employed plaintiff to obtain for him a purchaser for a certain piece of property, agreeing with plaintiff to pay him all above a certain sum over the purchaser's price for his service, it contains a sufficient averment of the employment of plaintiff.
2. *Same.*—A complaint alleging that defendant authorized plaintiff to sell defendant's property on specified terms, and that plaintiff fully complied with the same, and that when it was reported to defendant he approved and accepted the offer of the purchaser, and that the purchaser was able and willing to pay for the property, but that defendant refused to consummate the trade, sufficiently shows an employment of plaintiff.
3. *Same; Defenses; Statute of Frauds.*—It is no defense to an action to recover commission or compensation for the sale of land that the contract with the broker was within the statute of frauds.
4. *Same.*—The evidence in this case considered, and it is held that the question of plaintiff's employment was one for the jury.
5. *Same; Employment.*—When a real estate broker asks and obtains a certain price for real estate from the owner, that, without more, does not establish the relation of principal and agent, nor show a contract of employment.

APPEAL from Birmingham City Court.

Heard before Hon. CHARLES A. SENN.

This was an action by Bailey & Howard against Stevens to recover commissions as brokers in the sale of certain real estate. The averments of the counts in the complaint are sufficiently stated in the opinion. The demurrers being overruled to the counts, the defendants filed three pleas of the general issue and the following special pleas: 4. And for further answer thereto, defendant says that being importuned by plain-

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tiff, he expressed a willingness to accept \$8,000 for the property, but that he expressly refused and declined to employ plaintiffs or to contract with plaintiff to negotiate a sale thereof or to pay plaintiff any commission thereon. 5th. And for further answer thereto, defendant says that being importuned by plaintiff he expressed a willingness to accept \$8,000 for the property, but that he expressly refused and declined to employ plaintiff or to contract with plaintiffs to negotiate a sale thereof, and defendant further says that his willingness to accept said \$8,000, for said property, was not in writing, and subscribed by him, nor by any other person by him, thereto, lawfully authorized in writing. 6. That defendant being requested by plaintiffs to fix a price on such property, expressed a willingness to accept \$8,000 for said property, and defendant expressed such willingness entertaining the honest belief that he had a good title to said land having had quiet, peaceable, open, notorious, adverse and exclusive possession thereof, for over nineteen years under color of title, being the purchaser thereof for value. And defendant says that at the time the alleged offer of purchase was made, he was willing, ready and offered to convey said property by a deed to said purchaser for the consideration of \$8,000 with full covenants of warranty. 7. Defendant, for further answer, says that plaintiffs were not his said agent in and about the sale of said property; that he had no contract with plaintiff in and about the same but merely expressed a willingness to accept \$8,000 for said property, which was not in writing and subscribed by him, nor by any other person thereunto lawfully authorized. To the 3rd, 4th, 5th, and 6th counts, defendant says: 8. That defendant was at all times pending the negotiation for the sale of said property, ready, able and willing, to convey a reasonably good title to said property upon the receipt of \$8,000 cash. 9. That defendant was at all times pending the negotiation for the sale of said property, ready, able and willing to cure all objections which were made by said Miller to said title, and which impaired its validity and

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was ready, able and willing to convey said Miller such title so cured and corrected upon receipt of \$8,000 in cash. Demurrers were interposed to these pleas as follows: To plea 4, because all matters therein alleged, are available under the general issue, and because the same is not in confession and avoidance and it does not answer any count in the complaint. To plea 5, because it sets up the statute of fraud and the same was not applicable to the complaint or any count thereof. To the sixth plea, because it did not tender a material issue; because it sets up no defense to the action, honest belief on part of defendant as to his title being immaterial; and because, the title therein set up, would not operate necessarily to set up an indefeasible unincumbered title, and because the purchaser is not required to accept a warranty deed if defendant's title was not an indefeasible unincumbered title in fee simply. To plea 7, because the statute of fraud is no defense to any cause of action stated in the complaint, and because, a purchaser is not bound to accept a reasonably good title. To plea 9, because it is not averred that defendant offered to cure or remove all objections which impaired the validity of his title. The averments of the plea are merely matters of opinion and not of fact. The facts in the case are sufficiently stated in the opinion. There was verdict and judgment for plaintiff for \$327.00.

BRADLEY & MORROW, for appellant.—In order to render the owner liable for commissions to a real estate broker who finds a purchaser, where the trade is not consummated because of defective title the employment must be alleged and proved and the relation of principal and broker must be alleged and proved.—23 A. & E. Ency. of Law (2nd Ed.) p. 911; *Weinhouse v. Cronan*, 68 Conn. 250; *King v. Benson*, 22 Mont. 256. The sale must have been perfected or consummated before Stephens could have been liable.—*Ford v. Brown*, 120 Cal. 553. An implied contract can exist only where there is no express contract.—1 Chitty on Contracts (11 A. & E. Ed.) 89; *Wainhouse v. Cronan*, *supra*. Under the evidence Stephens is entitled to the general affirmative charge.—*Ford v. Brown*, *supra*; *Stewart v.*



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*Pickering*, 73 Ia. 652. It was Howard's duty to get the highest price for Stephens and the lowest price for Miller. "He cannot serve two masters."—*Luke*; *Martin v. Bliss*, 10 N. Y. Sup. 886; *Rice v. Wood*, 113 Mass. 133; *Campbell v. Barter*, 41 Neb. 729; *Capenher v. Hogan*, 40 Ia. St. 203; *Young v. Trainer*, 158 Ill. 428. The facts do not show the employment by Stephens.—*Carrol v. O'Shee*, 18 N. Y. Sup. 146. The court erred in admitting the opinion of Smyer as to the alleged defects in the title.—*Hess v. Eggers*, 76 N. Y. Sup. 980. The bringing of the parties together includes the idea of their being bound to each other in a valid contract.—*Blankenship v. Ryerson*, 50 Ala. 426; *Birmingham L. & L. Co. v. Thompson*, 86 Ala. 146; *Gilchrist v. Clark*, 86 Tenn. 583; *Toombs v. Alexander*, 101 Mass. 255; *Cooke v. Fiske*, 12 Gray. 491.

CABANISS & BOWIE, for appellee.—When the minds of the proposed purchaser and would-be vendor had been brought together the office of the real estate broker has been performed and he has earned his commission.—*Birmingham L. & L. Co. v. Thompson*, 86 Ala. 146. And the fact that the sale was never consummated does not weaken the force or application of the rule, provided the sale is not prevented by some fault or misrepresentation on the part of the broker, or on account of the inability of the proposed purchaser to pay.—s. c. 86 Ala. 146. Where a broker is employed to make a sale with the stipulation that he must obtain a net sum or obtain his commissions from the other party, and the trade fails without fault on his part but because of the fault of his employer he may recover his commissions against his employer.—*Atkinson v. Pack*, 19 S. E. 628; *Carander v. Waddingham*, 2 Miss. App. 551; *Livermore v. Crane*, 67 Pac. 221. The statute has no application to the present suit.—*Sayre v. Wilson*, 86 Ala. 151. Where a contract of employment has been fully performed on one side and nothing remains but the payment of money on the other, the common count will support a recovery.—*Beadle v. Grayham*, 66 Ala. 99; *Holloway v. Talbot*, 70 Ala. 389; *Stafford v. Sibley*, 106 Ala. 189.

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HARALSON, J.—The first and second were the common counts,—the first claiming \$250.00 due by account made by defendant with the plaintiff on the 7th of February, 1899; and the second for a like amount for work and labor done by plaintiff for the defendant at his request, on the 7th of February, 1899.

The third was for the same amount, with interest, setting up that on the 7th of February, “the defendant employed the plaintiffs who were real estate agents doing business in the city of Birmingham, Alabama, to obtain for him a purchaser for a certain piece of property \* \* \* in said city, and agreed with plaintiffs that they should be paid for their services all of the purchase price over and above the sum of eight thousand dollars, the defendant only insisting that he should realize said sum of eight thousand dollars net to him. And the plaintiffs aver that they did, within a reasonable time thereafter, and while said agreement was in full force, obtain a purchaser for said property at and for the sum of eight thousand two hundred and fifty (\$8,250.00) dollars, said purchaser being acceptable to said defendant, and being then ready, willing and able to pay therefor. Plaintiffs further aver, that notwithstanding the premises, the defendant had wholly failed, neglected and refused to pay them said sum of two hundred and fifty dollars,” etc.

The fourth and fifth counts were no more in respect to the employment of plaintiffs, than that defendant authorized the plaintiffs, who were real estate agents, to obtain for him a purchaser for the property referred to, who would pay him \$8,000.00, and the plaintiffs such additional sum as they required for their compensation, etc.

It is said, “In order to entitle a broker to recover compensation for his services, it is necessary that the person from whom he claims, shall have employed him to render the services out of which his claim arises, or that there should have been such an acceptance and ratification of his services by such person, as will in the eyes of the law amount to the same thing as an original employment.”

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It is also stated, "that the burden of proving the existence of the employment, is upon the person claiming compensation for his services; and whether or not, there was an employment of the broker who claims commissions, is a question for the jury on conflicting evidence."—23 Am. & Eng. Ency. Law (2d Ed.) 911, 912, and authorities there cited.

The definition of a broker seems to be, that he is an agent employed to make bargains and contracts between other persons in matters of trade, commerce or navigation, for a compensation, commonly called brokerage.—Story on Agency, § 28.

In *B. L. & L. Co. v. Thompson*, 86 Ala. 146, 5 South. 473, and in *Sayre v. Wilson*, 86 Ala. 151, 5 South. 157, the court held that the broker, or real estate agent, employed to effect a sale of land on specified terms, becomes entitled to his commissions, or agreed compensation, when he procures a person who is able, ready and willing to buy on the terms specified, and the vendor accepts him, although the purchaser afterwards declines to complete the contract on account of a defect of title. These cases seem to place the right of the real estate agent to compensation on the fact of his employment by the seller to sell the designated property. No one, it would seem, on sound principle, has the legal right to charge another for services rendered, unless he had been employed by that other, by contract express or implied, that he would compensate him therefor.

In the case of *Castner v. Richardson*, (Colo.) 33 Pac. 163,—after stating that, to entitle an agent to commissions, a contract of employment is necessary,—the court says: "When a real estate broker asks and obtains from the owner the price of certain real estate, or the price at which the owner is willing to sell, this, without more, does not establish the relation of principal and agent between the owner and the broker; it does not establish a contract of employment. If the rule were otherwise, no one would be safe in stating the price of his own property in the hearing of a broker."—*Viley v. Petit*, (Ky.) 29 S. W. 438.

No objection is raised to the first and second counts. The third avers employment of the plaintiffs as real es-

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tate agents by the defendant, to sell the property at a stipulated price to be paid by the purchaser; its sale to one Miller who was able and willing to pay the sum required to be paid to the defendant, and in addition thereto, the amount of \$250.00 as a part of the purchase price, which was to go to the plaintiffs as compensation for making the sale.

The count is sufficient in the averment of employment of plaintiffs by defendant, and is not subject to the demurrer interposed to it.

The fourth count does not in terms aver an employment of plaintiffs by defendant to sell the property, but it does aver that the defendant authorized the plaintiffs to sell the property on specified terms, which were fully complied with by the plaintiffs, and when reported to defendant, he approved and accepted the offer of the purchaser, who was ready, able and willing to pay for the property, and defendant wholly refused and failed to consummate said sale, without fault on the part of the purchaser or of plaintiffs, etc.

If the averments of this count (the fourth count) and of fifth and sixth are true, neither of them is lacking in averring the employment of the plaintiffs. A contract of employment, of a broker need not state the employment in terms, but it is sufficient if it states it in substance and effect. An agreement between the parties may show an employment of the agent.—*B. L. & L. Co. v. Thompson*, 86 Ala. 146, 5 South. 473. The demurrer to the fourth, fifth and sixth counts were properly overruled.

The demurrer to the pleas of defendant were properly sustained. The fourth and sixth, eighth and ninth were subject to one or more of the grounds of demurrer interposed to them. The fifth and seventh set up the statute of frauds as to the sale of the land by the plaintiffs to Miller. In an action to recover commissions or compensation for the sale of land by a broker, the statute of frauds is not available as a defense.—*Sayre v. Wilson*, 86 Ala. 152, 5 South. 157.

Whether or not the plaintiffs, as real estate agents, were employed by defendant to sell his property is a

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question of fact when the evidence is in conflict, proper for the determination of the jury.

The plaintiffs' evidence tends to show that they were employed by and represented defendant in the sale of his property at a stipulated sum and for stipulated compensation ;that they made the sale to a responsible person, agreeably with the terms of their employment, who was willing and able to pay the money and consummate the sale, and defendant failed and refused to comply with his contract without fault on the part of plaintiffs or the purchaser. Indeed, we may concede for the purpose in hand, that the averments of the several counts, on which the case was tried, were satisfactorily shown by the evidence of this witness. It is, therefore, unnecessary to here set out his evidence. There was, however, as we construe the evidence, sharp conflict between the evidence of the witness and defendant, Robert Stephens, the substance of whose evidence should be here set out. He testified, "that he had never employed Bailey & Howard to sell the property and that they were never his agents; that the first time the question of the sale of the property was discussed with plaintiffs, was when Howard came to his house, and asked him if he would sell the property; that witness told him that he would not,—didn't care to sell it; that Howard said he had a man in Birmingham who wanted to buy Birmingham property; that he had money in the Birmingham National Bank; that he wished he would put a price on it; that he studied a little while and finally told him that he would take eight thousand; that he would not pay any commissions; and that if he, Howard, sold it, the other man would have to pay the commissions \* \* \* that he had never agreed with Howard that he might have all over eight thousand that he could get for the property; that he never priced it above or below eight (\$8,000.00) thousand," etc.

On the cross he stated, that he knew plaintiffs were real estate agents; that Howard asked witness to name a price which he would like for the property to be sold; that witness named him the price at \$8,000; that it was understood that Howard was not to get any commission out of witness; that witness was to get \$8,000.00 out of

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the property free of commissions; that he gave Howard the right to sell the property at \$8,000, the other party to pay the commissions; that the purchaser was to pay the commissions, if he was paid, and that Howard then went away to make the sale. He further testified that Howard stopped him several times and asked him if he would not pay commissions; but witness always declined to do so; that he always stood to his first statement,—that witness was to have \$8,000 free of charges, and that witness always told Howard that he must look to the other man for pay.

On this state of the evidence the court gave the general charge for the plaintiffs, which was error.

The defendant furnished an abstract of title to his lot, which was examined at the request of the purchaser, by E. J. Smyer, his attorney, who found that the title was defective. Mr. Smyer gave a written opinion respecting the title of defendant to the land. The defect was, as pointed out by Smyer, that the deeds from two of the grantors in the chain of title to defendant, were not acknowledged so as to convey the dower of their wives. This opinion of the attorney was offered and admitted as evidence for the plaintiffs. The defendant objected because the evidence was illegal and irrelevant, which objection should have been sustained. The testimony of Smyer as to what Moore said was, however, incompetent.

The errors insisted on have been considered, and for error indicated, the judgment below is reversed and the cause remanded.

Reversed and remanded. All the Justices concur, except the Chief Justice, who was disqualified.

[Bienville Water Supply Co. v. Hieronymus Bros.]

## **Bienville Water Supply Co. v. Hieronymus Bros.**

*Action for Breach of Contract to Furnish Water.*

(Decided Feb. 14, 1907. 43 So. Rep. 124.)

1. *Waters; Water Supply; Contract; Forfeiture for Non-payment of Rent.*—One may not forfeit a contract for non-payment of rent, unless it is stipulated in the contract.
2. *Exceptions, Bill of; Construction; Presentation of Error.*—The bill of exceptions stated that the defendant thereupon offered in evidence "so much of the said book as applied to plaintiff's account, in connection with the evidence of the witness," and it also appears that the witness had testified concerning two or more books besides defendant's "semi-annual" book. It is not made to appear that the entries in one of the other books were correct. Held, as presented by the bill, the court cannot hold that the failure to permit the "semi-annual" book to be introduced was error, although of itself it might have been competent.
3. *Trial; Reception of Evidence; Exception; Time of Making.*—A receipt was proven and it was introduced in evidence without objection, and a witness testified that the payment was in full up to a certain time. Held, that a motion made at the conclusion of the evidence, to exclude the receipt and the witness' testimony, came too late.

APPEAL from Mobile Circuit Court.

Heard before HON. SAM'L. B. BROWNE.

Action by Hieronymus Brothers against the Bienville Water Supply Company for failure to supply water, whereby, and wherefrom, a bill belonging to plaintiff was destroyed. The pleadings and facts sufficiently appear from the opinion. From judgment for plaintiff this appeal is taken.

BESTOR, GRAY & BESTOR, for appellant.—The judgment against Hieronymus Brothers was res adjudicata as to the payment of the water rent and they could

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not insist that they had paid it.—*Durr v. Jackson*, 59 Ala. 203; *Tankersly v. Petis*, 71 Ala. 179; *Heard v. Pulaski*, 80 Ala. 502. The books of the Bienville Water Supply Works were admissible in evidence in connection with the other testimony.—*Bolling v. Fannin*, 97 Ala. 619.

GREGORY L. & H. T. SMITH, for appellee.—Having failed to re-file pleas A. B. and C. after amendment defendant was not entitled to the defense set up therein.—*Gadsden v. Bank*, 96 Ala. 618; *L. & N. R. R. Co. v. Wood*, 105 Ala. 561. The failure to pay rent is no defense to the independent promise to furnish water.—*Heironymus Brothars v. Bienville Water Supply Company*, 131 Ala. 447; s. c. 138 Ala. 577; *Drake v. Gorce*, 32 Ala. 409; *Maull v. Eiland*, 83 Ala. 314. One cannot accept a partial payment and then declare the contract forfeited on account of failure to make full payment.—*Stewart v. Frost*, 66 Ala. 28; *Anderson, et al. v. Tucker*, 127 Ala. 613; *Blackshear v. Burt*, 74 Ala. 242; *Necalle v. Bogan*, 97 Ala. 612. If the rentor or master enter upon a new term with full knowledge of a default permitted, in the previous term they waive the boot.—*Wood v. City of Auburn*, 32 Atl. 906; *Caldeau v. Montreal Gas Co.*, 28 Conn.; *Bartlett v. Greenleaf*, 11 Gray 98; *Felton v. Strong*, 37 Ill. App. 58. Under the facts in this case the entries on the books were not admissible in evidence.—*Hart v. Kendall*, 82 Ala. 147; *Acklen v. Hickman*, 63 Ala. 494; *Dismukes v. Tolson*, 67 Ala. 386; *McDonald v. Carnes*, 90 Ala. 148; (Overrules *Moore v. Andrews*, 5 Porter, 106); *Elliott v. Dyche*, 78 Ala. 150; *Davis v. Tarrer*, 65 Ala. 99; *Powell v. State*, 84 Ala. 444; *Pollak v. Scarcy*, 84 Ala. 260; *Hancock v. Kelly*, 81 Ala. 368; *First Nat. Bank v. Chaffin*, 118 Ala. 246; *Lane v. May*, 25 So. Rep. 809; *Batre v. Simpson*, 4 Ala. 305; 2 Enc. of Ev. 595; *Arery v. Arery*, 49 Ala. 193; *Kling v. Turnstall*, 109 Ala. 609; *Bank v. Plannett*, 37 Ala. 222; *Everly v. Bradford*, 4 Ala. 371; *Grant v. Cole*, 8 Ala. 519; *Clemmons v. Paton*, 9 Porter 289; *Bolling v. Fannin*, 97 Ala. 261; *Sands v. Hammell*, 108 Ala. 624.



[Bienville Water Supply Co. v. Hieronymus Bros.]

HARALSON, J.—This case is here on the third appeal. The first and second appeals are reported in 131 Ala. 447, 31 South. 31, and 138 Ala. 577, 36 South. 453, where the facts may be found fully set out.

It was agreed, that the trial, after the remandment of the cause on the last appeal, should be on the sixth and seventh counts, and all pleas to those counts, filed prior to the 21st of January, 1902, should be and were withdrawn, and omitted from the record.

The sixth count sets up the substance of the contract sued on, and declares a breach thereof, in this, that before the 1st day of May, 1897, a fire occurred on the premises where said fire hydrant was located, (near plaintiff's sawmill) which was discovered by plaintiff's servants early enough to have been extinguished by the use of said fire hydrant, had the defendant supplied the water and permitted the plaintiff to use the same for said purpose; but, by reason of said deficiency of water there was destroyed (property which is described) to the great damage of the plaintiffs.

The seventh count is the same as the sixth, except that in addition it sets out, *in hac verba*, the contract sued on as follows:

"State of Alabama, Mobile County.

"Whereas, Hieronymus Brothers, operating a sawmill on the east side of Water street, between Madison and Canal streets, in the city of Mobile, Alabama, desire a supply of water from the Bienville Water Supply Company for general uses in and about their mill, including one fire hydrant to be used for the extinguishing of fires, and

"Whereas, the Bienville Water Supply Company, a corporation created and existing under the laws of the State of Alabama, and operating water works for the supply of water for domestic, manufacturing and other uses to the inhabitants of the city of Mobile, and whose office is at No. 16 St. Joseph street, are willing to supply water to Hieronymus Brothers for the above named purposes in accordance with their rules and regulations governing their water consumers.

"This agreement witnesseth that Hieronymus Brothers, party of the first part, agrees to make the necessary

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pipe connection between the water main of the Bienville Water Supply Company, party of the second part, and the places on their property where they desire to use the water, and to keep same in repair, at their own cost and expense.

"The party of the second part agrees to furnish and maintain at their own cost and expense a meter of standard make for keeping a record of the quantity of water used by the party of the first part."

The breach of the contract, as counted on, is "Plaintiff's say that although they have complied with all of its provisions, on their part, the defendant has failed to comply with the following provisions thereof, that is to say, the defendant, during the life of said contract, and on the 17th day of April, 1897, cut off the water supply from said fire hydrant, and declined to furnish the water to said fire hydrant, after said date, and the plaintiffs aver, that thereafter, and before the first day of May, 1897, a fire occurred on the premises where said fire hydrant was located, which was discovered by the plaintiffs' servants early enough to have been extinguished by the use of said fire hydrant, had the defendant supplied the water, and permitted the plaintiffs to use the same for said purpose, but by reason of said deficiency of water, and the fact that the same had been cut off by the defendant, there was destroyed by fire," property of the plaintiffs which is described, to the damage of, to wit, the sum of \$10,000.00.

The defendant on the second appeal filed three pleas to the complaint, which were marked "A," "B," and "C," respectively. In plea A it is alleged, that plaintiff failed to pay the water rent due on the 1st day of November, 1896, up to and after the time of said alleged fire, wherefore defendant says, it is not liable. The same allegation is contained in plea B, with the addition, that by reason of said defect, the defendant terminated the contract by cutting off the water. Plea C. contained the same allegations of default in the payment of water rent, and the termination of the contract, and further, "that after the said alleged fire, the defendant brought suit in the circuit court of Mobile county against the plaintiffs for the rent of water for said fire hydrant, for

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the months of November and December, 1896, and for sundry months prior thereto, and recovered a judgment therefor, which said judgment recovered on a verdict, was rendered on the merits and remained in full force and effect until paid and satisfied by the said Hieronymus Brothers, wherefore defendant pleads said judgment as *res adjudicata*, and says that plaintiffs are estopped from alleging that they had paid the said water rent up to January, 1897, or that they had, before said alleged fire, complied with all the provisions of said contract on their part."

After the case was remanded by this court on last appeal, the defendant filed an additional plea marked "D," which alleges: "That under said contract, said water rent was payable semiannually on the 1st day of May and November, of each year, and defendant avers, that the plaintiffs failed to pay in full the water rent to the 1st day of January, 1897, which was due and payable on the 1st day of November, 1896, and continued in default up to and after the time of said alleged fire, and defendant terminated said contract by cutting off said water."

In addition to the above, and following it, said plea contains the further averment, "that after the said alleged fire, defendant brought suit in the circuit court of Mobile county against plaintiffs for balance of the rent for said fire hydrant for the months of December, 1896, and for sundry months subsequent thereto and recovered a judgment therefor, which said judgment was rendered on the merits and remained in full force and effect until paid and satisfied by the said Hieronymus Brothers, wherefore defendant pleads said judgment as *res adjudicata*, and says the plaintiffs are estopped from alleging that they had paid said water rent up to January 1st, 1897, or that they had, before said alleged fire, complied with all the provisions of said contract upon their part." A demurrer to this plea on a great number of grounds was sustained.

From the foregoing it will be seen, that this suit relates to the fire hydrant of defendant, at plaintiffs' mill, and the cutting off of the water at the same, which occasioned, as alleged, the destruction by fire of plaintiffs'

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mill, or a large part of it, for the lack of water at said hydrant, with which to extinguish the fire. By the terms of their contract with the defendant company, the plaintiffs, Hieronymus Brothers, agreed to pay to said company for the use of the fire hydrant, \$25 per year, in semiannual installments of \$12.50, on the 1st days of May and November of each year, and to use the hydrant for the extinguishment of fires only. This contract was dated January 1st, 1894, and it was provided therein that "the life of this agreement is for one year, commencing January 1st, 1894, and to continue thereafter until either party shall give the other thirty days' notice, in writing of their desire for a discontinuance."

The plaintiffs alleged, as before stated, that they had complied with all the provisions of their contract, and the defendant had failed to comply with its part of it, and during the life of the contract, and on the 17th of April 1897, cut off the water supply from said hydrant and declined to furnish water therefrom after that date, which occasioned the destruction of plaintiffs' property, as described, by fire occurring on the 20th of April, 1897.

The defendant pleaded the general issue, and plea D set out above. The plaintiffs proved by one of their number, that on February 11th, 1897, they paid to John McGuire, the collector of defendant, \$53.55, which was all they owed the water company for water rent up to January 1st, 1897, including rent of the water hydrant up to that date, and also introduced evidence tending to show that the water was cut off without plaintiffs' consent. But there are no points arising on the appeal as to this matter. We confine ourselves to the errors assigned and which are insisted on in argument, the first of which was, the sustaining of the demurrer to plea D. The first part of this was, as will be seen, no more than the general issue on the allegations of the complaint, denying that the plaintiffs had complied with their contract in the payment of rent. This was provable under the general issue. It is with the latter part of said plea, setting up *res adjudicata*, with which we have to do. The fact of the cutting off of the water, even if for default, did not estop defendant from suing for and recovering the rent that was due for the hydrant before the default

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in payment for it occurred, and before the water was cut off by it. A mere failure to pay rent does not entitle a landlord, or other renter, to declare a forfeiture, unless the right is expressly provided for in the contract, which was not the case here. In the construction of the contract in this case, it was said on a former appeal, "At the time the water was turned off, the contract had been so far executed, that it could have been rescinded by an agreement only." A contract by which one rents to another a water supply for a stipulated term, and the other agrees to pay a stipulated rent therefor, is an independent and not a dependent contract. As is said in 12 Am. & Eng. Ency. Law (1st Ed.) 758k, "A forfeiture may result from a non-payment of rent in accordance with the terms of the lease, when there is a covenant to that effect; but it is essential that the lease provide for such forfeiture, and that there be a demand for the rent." The demurrer to plea D was properly sustained.

The other assignment of error insisted on, is that the court refused to allow the introduction of defendant's books of entries of the account of plaintiffs, for November and December, 1896. These books were kept by Charles H. Tew. Conceding without deciding, that the "semiannual book" exhibited to witness Tew, would have been competent evidence, if it had been clearly identified as the one offered in evidence, yet, after the witness had testified, to at least two other books, the bill of exceptions states, that the defendant hereupon offered in evidence "so much of said book, as applied to Hieronymus Brothers' account, in connection with the evidence of the witness. Such portion of said book is hereto attached as exhibit C." Now, it is not clear from this, which book is offered in evidence, whether the "semiannual," cash or another book. It may be the one referred to by the witness as "this book," and it does not appear by the evidence of the witness that the entries were correctly entered in "this book." Bills of exceptions must be construed against the party excepting, and we cannot, as this matter is presented, hold that the court erred in not admitting the book.

John McGuire, who was shown to be the collector for the defendant company, gave to plaintiff a receipt sign-

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ed by him for the defendant company, and dated, "Mobile, Feby. 11th, 1897," acknowledging that he had "Received of Hieronymus Brothers, fifty-three and fifty-five hundredth dollars, water rent to January 1st." The execution of this receipt was proved and introduced in evidence without objection and W. T. Hieronymus, one of the plaintiffs, testified this payment was in full for all that plaintiffs owed the water company up to January 1st, 1897, including the rent for the fire hydrant. There was no objection made by defendant, to the introduction of this evidence, at the time it was offered. The defendant at the conclusion of the evidence, moved to exclude said receipt, and what W. T. Hieronymus had testified to on the trial, that the payment of this \$53.55 was in full payment of all the plaintiffs owed defendant, including rent of fire hydrant up to January 1st, 1897. The motion came too late, and, besides, the evidence was competent. The court on the last appeal (138 Ala. 577, 36 South. 453) ruled that the lower court committed error in excluding said receipt of McGuire; that the evidence of said witness was admissible; that the judgment in the case of Bienville Water Supply Company against those plaintiffs, the record of which was introduced in evidence, did not sustain the allegations of defendant's plea in this case, averring that plaintiffs failed to pay water rent due and payable on the 1st of November, 1896, and continued in default to and after the time of the alleged fire, and that said plea of *res adjudicata* was not sustained. 138 Ala. 586, 36 South. 453.

Finding no error in the record, to which our attention has been called in argument, the judgment below is affirmed.

Affirmed.

TYSON, C. J. and SIMPSON and DENSON, JJ., concur.

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### *Action for Breach of Contract.*

(Decided Jan. 17th, 1907. 42 So. Rep. 1008.)

1. *Sales; Contracts; Construction; Payment.*—A contract provided for the sale of certain lumber to be delivered at S. and stating the price to be paid per thousand as fast as loaded on cars at end sixty days negotiable bankable paper. Held, the contract was not void for indefiniteness on the theory that no obligation was imposed on the purchaser to load the cars at M., nor was the phrase sixty days negotiable bankable paper meaningless, as the law would imply a reasonable time in the absence of any provision as to the time of payment.
2. *Same; Conditions Precedent.*—Where the contract declared that the party of the first part agreed to manufacture, sell and deliver lumber to the party of the second part from time to time, and the party of the second part is obligated to receive the lumber, and the price to be paid per thousand feet was stated, the stipulation to deliver was an independent covenant, and a condition precedent to the duty of payment, and a failure or refusal to deliver would constitute a breach for which an immediate action would lie.
3. *Same; Breach; Waiver.*—The right of a seller to terminate a contract of sale upon the refusal of the purchaser to perform by payment for goods already delivered, may be waived by words or by conduct.
4. *Same; Payment.*—The provision of the contract by which the first party agreed to manufacture and sell lumber to the second party at a certain sum per thousand feet as fast as loaded on the cars at M., for all lumber dressed or rough, "and all dry kiln lumber shipped by the second part previous to the erection and operation of the mill for planning by the second party," does not render the contract incomplete, in that it fixes the price for such lumbers as might be shipped previous to the erection of the mill; the phrase "previous to the erection and operation" is limited to the dry kiln lumber shipped, and not to all the lumber dressed or rough.
5. *Same; Assignment of Contract; Provisions for Personal Service.*—The contract provided that both parties should have the

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right to assign the same, and that the party of the first part should have nothing to do with the kiln business. It also provided that the party of the first part should turn over to the party of the second part the dry kiln and sheds and other appurtenances thereto then in operation at first parties mill, and furnish the steam to dry the lumber; the party of the second part agreed to furnish his skill and services in making the changes necessary for making more steam and in case the kiln should be destroyed, the party of the second part would give his skill and services in assisting to rebuild it. The party of the second part assigned the contract. Held, in an action by the assignee of the contract for damages because of the party of the first parts refusal to deliver the lumber, the complaint was not demurrable on the ground that the agreement contained an obligation for personal services by the assignor, and the transfer did not relieve him from performing the same. The provisions for personal service having no reference to the sale or purchase of the lumber.

6. *Damages; Speculative Damages; Breach of Contract.*—Where the contract required party of the first part to deliver certain described lumber to party of the second part that might be made by party of the first part "while operating his mill on other regular orders," no damages could be recovered in an action for damages for breach of the contract to sell and deliver, based on a prospective operation of the mill, such damages being entirely speculative.
7. *Statute of Frauds; Contracts not to be Performed Within the Year.*—The written contract provided that it should remain in full force for a year, but that the second party might at his option renew it for an additional period of five years. Held, it was not necessary, to save the contract from the statute of frauds, that the parties thereto enter into a new writing.
8. *Pleading; Reference by One Count to Another.*—The first count contained an averment of the assignment of the contract, but the second did not. The second count adopted by reference the contract set out in the first count, but did not adopt averment of assignment of contract set out in the first count. Held, demurrable for failure to do so.
9. *Same; Striking Out Matter.*—Where the recovery is sought for speculative damages, in an action on the contract, and this appears from the complaint, motion to strike from the complaint that portion relating to such damages was the proper method of reaching the objectionable matter; or the objection may be taken advantage of by requested instructions or by objection to evidence.



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APPEAL from Mobile Circuit Court.

Heard before Hon. SAMUEL B. BROWNE.

Action for breach of contract by appellee against appellant. The complaint was in the following language:

"Plaintiff claims of the defendant the sum of forty thousand dollars damages for the breach of a contract which is in words and figures as follows: 'This agreement, made and entered by and between J. W. Byrne, and S. E. Byrne, doing business under the name of the "Byrne Mill Company," party of the first part, and Warren Hamilton, party of the second part, witnesseth: The said Byrne Mill Company hereby agrees to manufacture, sell, and deliver to Warren Hamilton, and the said Warren Hamilton agrees to buy and receive from the said Byrne Mill Company, at their mill near Stockton, Ala., the following lumber, to wit: All of the sap boards, other than what is known as "mill culls," they may make while operating their mill on other regular orders. The said Warren Hamilton is to receive said sap boards as they run, consisting of number 2 common and better, and also any boards that will not grade heart face; widths of said sap boards to run from three inches and up, and length of ten, twelve, fourteen, sixteen, eighteen and twenty feet, but no more than ten per cent. to run ten feet. The said Byrne Mill Company agrees not to select or pick out anything from the side board run of the mill except what will go 1x4 and up heart face; but all the sap boards of all widths are to be considered in this agreement, and are to be delivered as they run at the end of the roller way at the end of the dry kiln at said mill. The Byrne Mill Company agrees to furnish and turn over to said Warren Hamilton the dry kiln and sheds and all appurtenances thereto belonging that are now in operation at their said mill, everything complete, and to furnish the steam day and night in sufficient quantities to dry the lumber to the requirements and satisfaction of said Warren Hamilton, free of cost to him, except that said Warren Hamilton agrees to furnish his skill and service in making changes necessary for making more steam for said kiln. The said Byrne Mill Company also agrees to furnish any lumber necessary for the erection of more room for storing the dry-

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kiln lumber, should more room be necessary, or for any other improvement said Warren Hamilton may desire to make. The said Byrne Mill Company further agrees to furnish the necessary power during the term of this contract for the purpose of operating a planing-mill business by the said Warren Hamilton; the said power to be furnished free of rent or costs to the said Warren Hamilton, he agreeing to make from time to time all necessary minor repairs to said power at his expense, as it is understood that the said Byrne Mill Company will have nothing to do with the planing-mill and dry-kiln business, but said Warren Hamilton shall have full charge and control of everything pertaining to said dry kiln and planing mill. The price to be paid by the said Warren Hamilton for the sap boards shall be \$5.50 per thousand feet superficial (no odd lengths counted), as fast as loaded on cars at Mobile, 60 days negotiable bankable paper for all lumber, dressed or rough, and for all dry-kiln lumber shipped by said Warren Hamilton previous to the erection and operation of his planing mill. This agreement to remain in full force and effect for one year; but said Hamilton has the right to renew the same for five years additional. It is distinctly understood and agreed that the said Hamilton and the Byrne Mill Company has the right to transfer or assign this contract, and all rights and liabilities assumed herein to any person or persons. It is further understood and agreed that, if said dry kiln is destroyed or damaged by fire or by the elements, then the same shall be repaired or rebuilt by the said J. W. Byrne and S. E. Byrne, doing business as the Byrne Mill Company. Said Hamilton, in the event of the destruction of said kiln, agrees to give his skill and attention as a mechanic to rebuilding the same. It is further agreed that, if the dry kiln is destroyed, the said Hamilton has the option not to take the sap boards until the dry kiln is rebuilt. This agreement is executed in duplicate this the 21st of November, 1901. (Here follows the signatures and witnesses.) It is understood that the power referred to, to be furnished by the said Byrne Mill Company, is the water power as now existing at their said mill. Which said contract was assigned by Warren Hamilton to

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plaintiff, and was renewed for an additional term of five years as provided for in said contract. And plaintiff avers that the defendants broke said contract, in this: That they failed and refused to sell and deliver to plaintiff any lumber or boards made by them at their sawmill after November 21, 1902, and on, to-wit, December 2, 1903, notified plaintiff that they would not further perform said contract, although the defendants intended to, and did, after the 21st day of November, 1902, continue to operate said mill on regular orders down to the bringing of this suit, and expected and intended to operate the same thereafter, and did, in so operating said mill, make prior to the commencement of this suit a large quantity of lumber of a character that the defendants had by their contract agreed to sell to the plaintiff, to wit, two million of feet of such lumber, and would thereafter during so much of a period of five years from the 21st day of November, 1902, as was subsequent to the bringing of said suit, make, in such operation of their said mill, an additional large quantity of such lumber, to wit, sixteen million feet thereof, to the plaintiff's damages as aforesaid.

"(2) Plaintiff claims of the defendants the further sum of forty thousand dollars damages for the breach of a contract which is set out in the first count hereof, and is here referred to and made a part of this count, and plaintiff avers that defendants broke said contract in this: That they failed and refused to sell and deliver to plaintiff any lumber or boards made by them after November 21, 1902, and on, to wit, the 2nd day of December, 1903, notified plaintiff that they would not further perform said contract, although the defendants intended to, and did, after the 21st day of November, 1902, continue to operate their said mill on regular orders down to the bringing of this suit, and expected and intended to operate the same thereafter, and did, in so operating said mill, make prior to the commencement of this suit, a large quantity of lumber of a character that the defendants had by their contract agreed to sell to plaintiff, to wit, two million of feet of said lumber, and would thereafter, during so much of the period of five years from said 21st day of November, 1902, as was sub-

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sequent to the bringing of this suit, make, in such operation of their sawmill, an additional large quantity of lumber, to wit, sixteen million feet thereof; and plaintiff avers that he has at all times been ready, willing, and able to receive and pay for all of said lumber in the manner provided in said contract, and to do all other things that he was obliged by the terms of said contract to do."

The defendant moved the court to strike from each count of the amended complaint filed herein so much of said counts as claimed damages for and on account of the refusal of defendants to sell and deliver to the plaintiff lumber manufactured and to be manufactured subsequent to the institution of this suit, upon the ground that the right of plaintiff to purchase said lumber by virtue of the terms of the contract set out in said complaint accrues and comes into existence only after the lumber has been manufactured in the manner contemplated by said contract, and also upon the further separate ground that it is impossible to know at any given time whether any, and, if so, how much, lumber covered by said contract will be thereafter manufactured by the defendant, and also upon the further ground that the contract set out in said complaint imposes upon the defendant only a conditional obligation to sell lumber to the plaintiff, and such obligation becomes absolute only after the condition has been performed. This motion was overruled. The defendants then demurred to the first count, because the agreement set out in the said contract is too indefinite and contradictory in its terms to be enforced; the alleged agreement shows on its face that the only obligation of defendants to manufacture lumber was to manufacture what they may make, which expression is without meaning; the agreement fails to show a complete contract or agreement between the parties, in that it states the price to be paid for the lumber only previous to the erection and operation of a planing mill, and fails to state any price for the lumber after the erection and operation of the planing mill; because the method of payment in the agreement made a part of said count is unintelligible; because the agreement cannot be enforced, the only obligation of the plaintiff to

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pay for the lumber mentioned therein being based upon a contingency which may never happen; because by the agreement the lumber shall be paid for as fast as loaded on the cars at Mobile, 60 days negotiable bankable paper, and provides no other time for payment, yet it contains no obligation on the part of the plaintiff or of the plaintiff's transferee to ever bring the lumber to Mobile; said agreement contains an obligation for personal service of a skilled character by the said Warren Hamilton, and the transfer of the alleged contract does not relieve the said Warren Hamilton from personally performing the said services yet the complaint fails to aver the performance thereof by the said Warren Hamilton, or a readiness on his part to perform. The defendant demurred to so much of first count as seeks to recover damages for a failure on the part of defendant to sell and deliver the plaintiff lumber manufactured and to be manufactured after the institution of this suit on the same grounds set out in the motion to strike. These demurrers were overruled as to the first count, and were interposed and overruled to the second count. The defendant then filed a number of special pleas raising the same defenses as were interposed by demurrers and motion to strike, to a great many of which demurrers were sustained; but the above pleading is sufficient for proper understanding of the opinion.

There was judgment for plaintiff in the sum of \$2,160, and the defendant appeals.

STEPHENS & LYONS, for appellant.—The contract is unintelligible and unenforceable because it is impossible to ascertain therefrom the character of security or paper to be taken for the purchase price of the lumber.—5 Cyc. 226; *E. P. A. Co. v. M. E. L. Co.*, 70 N. W. 650. The contract is unintelligible as to place of payment.—*Cross v. Scruggs*, 115 Ala. 258; *Randell v. Johnson*, 42 Am. Rep. 365; *Newnez v. Davell*, 19 Wall 560; 8 Rose's Notes, 269; *Keenan v. Lindsey*, 127 Ala. 270. An executory contract for the sale of chattels is incomplete until the price is agreed upon.—*Sheally v. Edwards*, 73 Ala. 175; *Wilkinson v. Williamson*, 76 Ala. 163; *Mainer v. Appling*, 112 Ala. 663. To maintain an action on a con-

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tract the fulfillment of the condition precedent must be alleged and proven.—*Bell v. Real Estate & Banking Co.*, 3 Ala. 77; *Flouss v. Eureka Co.*, 80 Ala. 30; *Redmond v. Aetna*, 4 N. W. 591; *Chambers v. N. W. I. Co.*, The entire right upon which a suit is based must exist at the time the suit is brought.—*Donaldson v. Waters*, 30 Ala. 175; *Russell v. Gregory*, 62 Ala. 454; *Goodman v. Winter*, 64 Ala. 410; *Seisel & Co. v. Folmar & Son*, 103 Ala. 491; *McCrary v. Chase*, 71 Ala. 540; *Burns v. Campbell*, 71 Ala. 271; *P. & M. M. I. Co. v. Selma Sav. Bk.*, 63 Ala. 585; *Hill v. Hill*, 10 Ala. 527; *Vaughn v. Vaughn*, 30 Ala. 329; *Land v. Cowan*, 19 Ala. 297; *Stein v. Burden*, 24 Ala. 130.

A charge predicating plaintiff's right to recover upon proof which falls short of covering all his case is erroneous.—*Miller v. Clay*, 57 Ala. 162; *Bane v. The State*, 61 Ala. 75; *Roland v. The State*, 55 Ala. 210. The duty was upon the court to construe the written agreement and the court erred in submitting the construction of it to the jury.—*Southern Express Co. v. Cook*, 44 Ala. 468; *Klaghorn v. Lingo*, 62 Ala. 230; *Bernstein v. Humes*, 60 Ala. 582; s. c. 72 Ala. 546. The court erred in giving charge A. and in refusing the several affirmative charges requested by the defendant as well as charge 7.—*Tyree v. Lyon*, 67 Ala. 1; *Teague v. Bass*, 131 Ala. 422; *Lehman v. McQueen*, 65 Ala. 572.

GREGORY L. & H. T. SMITH, *for appellee*.—It is not reversible error to assume the truth of facts shown by the undisputed testimony and not controverted between the parties.—*Carter v. Chambers*, 79 Ala. 223; *Stephenson v. Wright*, 111 Ala. 579. When a cause of action accrues there is a right to all the consequent damages which may ensue.—*Fail, et al. v. McKrae*, 36 Ala. 61; *Liddell v. Chidester*, 84 Ala. 510; *Wilkinson v. Black*, 80 Ala. 331; *Strauss v. Merteif*, 64 Ala. 307. The refusal of defendant to further perform and their express repudiation constituted a total breach.—*Trustees v. Turner*, 71 Ala. 434, and when this occurs the other party may sue for the entire damages which will accrue without waiting for the time for the performance of each item to run.—*Freer v. Denton*, 61 N. Y. 492; *Donivan v. Sheridan*, 24

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N. Y. Sup. 116; *Windmuller v. Pope*, 14 N. E. Rep. 406; *Remy v. Olds*, 88 Cal. 537, s. c. 26 Pacific 355; *Norman S. Jewitt v. S. P. Brooks*, 134 Mass. 505; *Davis v. Grand Rapid School Fur. Co.*, 24 S. E. 630; *Hobbs v. Mohr*, 30 Atlantic 110; *McCormick v. Bassal*, 46 Iowa 235; *Crabtree v. Messersmith*, 19 Iowa 235; *Dingley v. Oler*, Fed. 372.

The contract was not void for uncertainty.—*Merril v. Bell*, 14 Miss. 6; *City of Stockton v. Webber*, 33 Pac. 332. The time of payment is not uncertain.—*Culver v. Caldwell*, 137 Ala. 133; *Crass v. Scruggs*, 115 Ala. 264; *Jones v. Eisler*, 3 Kan. 128; *Lewis v. Tipton*, 10 Ohio St. 88. A stipulation to do a subsequent act cannot be a condition precedent.—*Bailey v. White*, 3 Ala. 330; *Mullins v. Cabaniss*, Minor 21; *Drake v. Goree*, 22 Ala. 409. Where a part of the consideration is to be received before the other stipulation can mature the two are severable and independent.—*Fulcnwider v. Rowan*, 136 Ala. 287. The failure of one party to perform an independent stipulation does not discharge the other party to perform his independent stipulation.—*Hieronymous Bros. v. Bionville W. S. Co.*, 131 Ala. 347. Counsel discuss written charges given and refused but cite no authority except as to charge 2 given at the request of plaintiff to which they cite the following: *Samples v. Guyer*, 120 Ala. 611; *Thomas & Trott v. Ellis & Co.*, 4 Ala. 108; *Merriceather v. Taylor*, 15 Ala. 735; *Kirkland v. Oates*, 25 Ala. 465; *Hawkins v. Gilbert & Maddox*, 19 Ala. 54; *Hunter v. Waldron*, 7 Ala. 753; *Aiken v. Bloodgood*, 12 Ala. 221; *Strauss v. Meertief*, 64 Ala. 299; *McTighe & Co. v. McLane*, 93 Ala. 626; *M. & O. R. R. Co. v. Nicholas*, 98 Ala. 118; *Ovendorf v. Tallman*, 90 Ala. 441; *Foster v. Gressett*, 29 Ala. 393; *Dent v. Long*, 90 Ala. 172; *Howard v. Thompson Lumber Co.*, 50 S. W. 1092; Clarke on Contracts, page 676, and citations.

DOWDELL, J.—This is an action brought by the plaintiff, E. H. Robertson, appellee here, against the Byrne Mill Company, a firm or partnership, for the breach of a contract entered into by said Byrne Mill Company with one Warren Hamilton, and which contract was by said Hamilton assigned to the plaintiff. The

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complaint as amended contained two counts. In the first count the contract sued on is set out in full, and by reference thereto is adopted into the second count. The alleged breach of the contract consisted in a failure and refusal on the part of the defendants to deliver to the plaintiff certain lumber described in the complaint, and which plaintiff claims, under the terms of the contract, the defendants were bound to deliver. To both counts of the complaint as amended the defendants filed demurrers, which were upon consideration by the court overruled. The defendants then moved to strike certain parts of the complaint, which motion was by the court overruled. Pleas were then filed, to several of which demurrers interposed by the plaintiff were sustained.

The main question raised by these pleadings and rulings is the proper construction of the contract sued on; the insistence of the appellants being that the contract is void for indefiniteness and uncertainty. This contention is chiefly based on the following provisions contained in the contract: "The said Byrne Mill Company hereby agrees to manufacture, sell, and deliver to the said Warren Hamilton, and the said Warren Hamilton agrees to buy and receive from the said Byrne Mill Company at their mill near Stockton, Ala., the following lumber, to-wit: All of the sap boards, other than what is known as 'mill culls,' they make while operating their mill on other regular orders." The said Warren Hamilton is to receive said sap boards as they run, consisting of number 2 common and better, and also any boards that will not grade heart face; width of said sap boards to run from three inches and up, and length of ten, twelve, fourteen, sixteen, eighteen, and twenty feet, but no more than ten per cent to run ten feet. The said Byrne Mill Company agrees not to select or pick out anything from the side board run of the mill, except what will go one by four and up, heart face; but all the sap boards of all widths are to be considered in this agreement and are to be delivered as they run at the mill, end of the roller way at the end of the dry kiln at said mill. \* \* \* The price to be paid by the said Warren Hamilton for the sap boards shall be five dollars and fifty (\$5.50) per thousand feet superficial (no odd



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lengths counted), as fast as loaded on cars at Mobile, sixty days negotiable bankable paper, for all lumber, dressed or rough, and for all dry kiln lumber shipped by said Warren Hamilton previous to the erection and operation of his planing mill." It may be said that the contract was unskillfully drawn; but it is not so indefinite and uncertain in its terms as to render the ascertainment of its meaning or of the intention of the parties to it impossible. When it can be done consistently with the expressed intention of the parties, that construction should be given to contracts which will uphold, rather than defeat, them. A maxim of the law is "Ut res magis valeat quam pereat." Here the intention is clearly expressed on the one part to sell and on the other to purchase certain lumber, and the further intention of the parties that the seller shall deliver at a particular place certain lumber described in the contract and the purchaser to receive and pay for the same at a price fixed, namely, "five dollars and fifty cents (\$5.50) per thousand feet superficial as fast as loaded on cars at Mobile, sixty days negotiable bankable paper."

It is insisted that the provision "as fast as delivered on cars at Mobile" is a contingency that may never happen, and, as no obligation is imposed by the contract to load on the cars at Mobile, the contract is clearly rendered indefinite as to time of payment. Whether there is an implied promise, or not, in this provisions on the part of the plaintiff to load the lumber on the cars at Mobile, we need not decide. It is evident that this provision was inserted for the benefit of the plaintiff, and without it, no time being definitely fixed, the law would imply a reasonable time. The question here involved is fully covered by the principle laid down in *Culver v. Caldwell*, 137 Ala. 132, 34 South. 13.

It is further insisted that in the phrase employed in the contract, "negotiable bankable paper," the words "bankable paper" are meaningless. If this were true, the word "bankable" might be regarded as surplusage without altering or changing the contract, as affecting the intention of the parties entering into it; but the

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words "bankable paper" are not without a definite or certain meaning. See 5 Cyc. p. 226.

The stipulation in the contract to deliver the lumber is an independent covenant. By the express terms of the contract it is made a condition precedent to the duty of payment by the purchaser. Therefore, a failure or refusal to deliver would constitute a breach, for which an action would immediately lie. However, where the contract is to be a continuing one, with stipulation for the delivery of goods by the seller at different times, and the payments to be made by the purchaser as the goods are delivered, we are not to be understood as holding that the seller would not be justified in terminating the contract to further deliver upon the failure and refusal of the purchaser to perform his part of the contract by payment for the goods already delivered; but such right to terminate the contract by the seller may be waived expressly or by conduct.

By the express terms of the contract it is provided "that the said Byrne Mill Company have nothing to do with the planing mill and dry-kiln business, but said Warren Hamilton shall have full charge and control of everything pertaining to said dry-kiln and planing mill." We think from this it is made perfectly plain that the provisions in the contract relating to the planing mill and dry kiln were inserted for the sole benefit of Warren Hamilton, or his assigns, and in no manner affect the contract as to the sale and delivery of the lumber as stipulated.

It is also insisted that, in the provision in the contract fixing the price to be paid for the lumber, the clause "for all lumber, dressed or rough, and for all dry-kiln lumber shipped by said Warren Hamilton previous to the erection and operation of his planing mill," renders the contract incomplete, because the same "fixes the price for only an undetermined portion of the lumber agreed to be sold, namely, such as might be shipped previous to the erection and operation of a planing mill, and no price for that which might be shipped subsequent to the erection and operation of the planing mill." We think this is a strained construction to put upon said provis-

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ion in the contract. The provision is "for all lumber, dressed or rough, and for all dry-kiln lumber shipped by said Warren Hamilton previous to the erection and operation of his planing mill." It is evident that the word "all lumber, dressed or rough," included all dry-kiln lumber shipped by said Hamilton. The words "previous to the erection and operation of his planing mill" are limited to the "dry-kiln lumber shipped," and not to "all lumber, dressed or rough." The use of the word "for," as employed in the clause, we think clearly indicates this.

The contract contains the following provision: "It is distinctly understood and agreed that the said Hamilton or the Byrne Mill Company has the right to transfer or assign this contract and all rights and liabilities assumed herein to any person or persons." From this it is manifest that it was not the intention of the parties that the provision relating to the skill of Warren Hamilton should any wise affect the contract as to the sale and purchase of the lumber in question. The matter of skill of Warren Hamilton relates entirely to the use of the dry kilns and planing mill, and, as we have said above, these provisions in the contract are solely for the benefit of said Hamilton.

By the terms of the contract, no duty or obligation rested upon the defendants to operate their mill. The extent of the obligation imposed was to deliver certain described lumber that they might make while operating their mill "on other regular orders." It is evident, therefore, that damages for failure to deliver lumber based upon a prospective operation of the mill would be entirely speculative. This feature of the contract, we think, clearly differentiates this case from that class of cases cited by counsel for appellee, where the recoverable damages in an action for the breach of the contract before the time of its completion may be estimated and computed to the end of the contract period. Upon like principle in this suit only such damages can be recovered as existed at the time of the commencement of the action and resulting from a nondelivery of the lumber up to that time. It would be an anomaly to hold that damages which could not be recovered at the commence-

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ment of the suit because of being speculative might nevertheless, by results transpiring subsequent to suit brought, become recoverable in the particular suit. Nor do we think in this case that the situation is relieved by the averment in the complaint that the defendants notified the plaintiff that they would not perform the contract.

The contract contained the following clause: "This agreement to remain in full force and effect for one year; but said Hamilton has the right to renew the same for five years additional." We construe this to mean nothing more nor less than an option to Hamilton to extend the contract for a period of five years. The same consideration which supported the original contract was sufficient to support the extended contract; and in the exercise of this option by Hamilton it was not necessary for the parties to enter into any new writing to save it from the statute of frauds. The original contract itself, which was in writing, was sufficient to this end, and in the exercise of the option or right any unequivocal notice by Hamilton to the defendants that the contract would be continued for five years, given before the expiration of the first period, would be sufficient. We do not think that the statute of frauds has any application.

While the first count of the complaint contains an averment of the assignment of the contract to the plaintiff, the second count does not. The second count does by reference adopt into it the contract as set out in the first count, but does not by such reference adopt the averments of the first count relative to the assignment of the contract. In this respect the second count of the complaint was defective, and subject to demurrer.

The motion to strike from the complaint that portion relating to damages based upon the future operation of the mill by the defendants was the proper mode of reaching the objectionable matter, and should have been sustained, although the same end might have been accomplished on objections to evidence or requested instructions to the jury.—*Kennon v. W. U. Tel. Co.*, 92 Ala. 399, 9 South. 200; *Daughtery v. W. U. Tel. Co.*, 75 Ala. 168, 51 Am. Rep. 435.

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The foregoing views will point out sufficiently the errors committed on the trial, and will serve as a guide upon another trial. For the errors indicated, the judgment of the court will be reversed, and the cause remanded.

Reversed and remanded.

TYSON, C. J., and ANDERSON, and McCLELLAN, JJ., concur.

### Patt v. Gerst.

#### *Action for Damages for Breach of Contract of Sale.*

(Decided Jan. 24th, 1907. 42 So. Rep. 1001.)

1. *Frauds, Statute of; Contracts for Sale of Real Estate; Requisites.*—To be without the statute of frauds, the writing constituting the contract for the sale of real estate must state the contract with such certainty that its essentials will be known from the memorandum itself or by reference therein to some other writing without recourse to parol evidence.
2. *Same; Evidence.*—The contract relied on for the sale of real estate was sought to be evidenced by certain letters and telegrams which did not describe the property nor state the contents, a telegram from the owner reciting that he would sell the property for a certain sum cash and certain propositions made by his agents, resting in parol, and a deed drawn up at the instance of the owner describing the premises, but which was not delivered and which showed that the parties did not agree as to the terms of the sale; Held, not to show a sufficient compliance for a sale of real estate under the statute of frauds.
3. *Appeal; Prejudicial Error; Exclusion of Evidence.*—It was not error to exclude the testimony offered by plaintiff where the same failed to make out a prima facie case for him under the pleading.

APPEAL from Mobile Circuit Court.

Heard before Hon. SAMUEL B. BROWNE.

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Action by Joseph Patt against William Gerst. From a judgment for defendant, plaintiff appeals. Affirmed.

The alleged contract provided for the sale of certain land by the defendant to the plaintiff, and that plaintiff was to become agent of the defendant for the sale of beer, and was to form a copartnership with one Phillips for the conduct of a restaurant and saloon, in which they should sell the beer, in consideration of which it was stipulated that the plaintiff would give the defendant the use of a portion of the property rent free for defendant's stable and cold storage of defendant's beer for a period of five years, and the defendant, after the five years, was to pay \$350 a year rent. The second count was for a breach of the contract, alleging simply the obligations to sell the land, and omitting the other provisions of the contract. The third count was upon an open account. The case was tried upon six pleas: The general issue; non est factum; the statute of frauds, in that the contract was not performed within a year and was not in writing; the statute of frauds, in that the contract provided for a sale of land and was not in writing; that the plaintiff had himself repudiated and declined to perform the said contract before the alleged breach by the defendant; and the plaintiff's inability to perform the contract. The facts which the plaintiff sought to prove, and which would have been shown, had all of plaintiff's testimony been admitted, were: That the plaintiff made some sort of an agreement with one Baker and William Gerst. That in May, 1904, he received this telegram: "Will let you have property for \$4,000 cash and proposition made Baker. Wire answer. (Signed) William Gerst & Co." That on the same day plaintiff replied to that telegram, and that there was no other correspondence between the plaintiff and defendant in this case on any other subject than the subject of the purchase of the property about which this suit is brought. That the plaintiff had some correspondence with William Gerst during the year previous to the trial the substance of which does not appear. That there was in existence an unsigned paper, stating the terms of the contract as set out in the first count and describing the land so sold, but that this paper was never signed by

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defendant and was never delivered to plaintiff. That in response to the telegram received by plaintiff from defendant, above set out, the plaintiff sent a telegram to William Gerst Brewing Co., stating that the offer was accepted and the money had been deposited in the First National Bank of Mobile, and that in fact he had deposited this money. That plaintiff wrote and mailed the following letter, addressed to the William Gerst Brewing Co., dated Mobile, June 20, 1904: "Dear Sir: Yours of the 17th at hand. According to telegram received from Gerst Brewing Co., the trade was closed. I deposited your money, \$4,000, at the First National Bank, Mobile, Ala., at that time. The following telegram was sent me: 'Will let you have property for \$4,000 cash and proposition made Baker. Wire answer.' I answered: 'I accept your proposition and offer. Your \$4,000 at First National Bank. Send draft for same, with papers attached, to same.' You answered: 'Will forward deeds and agreement as soon as Attorney Smith sends our deed and abstract.' I answered: 'Send all papers and drafts to First National Bank, subject to examination.' I have not received any deed or abstract, and I ask you to send them as soon as possible. (Signed) Joseph Patt." That the plaintiff received the following letter, dated Nashville, Tenn., June 17, 1904, and addressed to plaintiff: "Dear Sir: Mr. Gerst has returned from trip, and says that you have failed to comply with terms as stipulated. He considers the trade off. With very best wishes for your success and continued friendship, I am, (Signed) Joseph Baker."

MCALPINE & ROBINSON, for appellant.—The court should have permitted the plaintiff to be asked if he had any agreement with one Baker and Gerst.—*Anderson v. Snow*, 9 Ala. 247. The court erred in sustaining objection to the following questions: Did you receive that telegram? And state whether or not you received a telegram from Gerst or The Gerst Brewing Company.—2 Parson's on Contract, (9th Ed.) p. 295; *Wilden & Sons v. Merchants & Planters National Bank*, 64 Ala. 15. The court erred in not permitting the plaintiff to state

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whether or not he replied to the telegram.—*White v. Breen*, 106 Ala. 159. The court erred in sustaining motion of defendant to exclude the answer of the witness that he got the telegram at the W. U. Tel. Co. office.—*Authorities supra*. Plaintiffs should have been allowed to state whether or not he sent a reply to the telegram. The court should have permitted the letter to be introduced in evidence and the witness should have been permitted to show that it was sent by him through the mails and to whom it was addressed.—*Pioneer Co. v. Thompson*, 115 Ala. 552; *O'Connor v. Dickson*, 112 Ala. 304; *White v. Tolliver*, 110 Ala. 306.

GREGORY L. & H. T. SMITH, for appellee.—Parol evidence cannot supply defects in a contract that is otherwise under the statute of frauds.—*Nelson v. Shelby Mfg. Co.*, 96 Ala. 528. In order to comply with the statute of frauds the contract must contain the names of the parties, the subject matter of the contract, the consideration of the promise and leave nothing open for future pleading.—*Carter v. Shorter*, 57 Ala. 256; *Jenkins v. Harrison*, 66 Ala. 345; *Phillips v. Adams*, 70 Ala. 376; *Nelson v. Shelby Mfg. Co.*, *supra*; *Reynolds v. Kirk*, 105 Ala. 450. The telegram and the evidence relative thereto were not admissible.—*O'Connor Mining & Mfg. Co. v. Dixon*, 112 Ala. 303; *Southern Ry. Co. v. Howell*, 135 Ala. 639. There was nothing upon which the jury could rest the verdict and it was therefore proper for the court to rule out the material testimony and give the jury the general charge for the plaintiff.—*Talladega Ins. Co. v. Peacock*, 67 Ala. 262; *Gulf Const. Co. v. L. & N. R. R. Co.*, 121 Ala. 624; *Pritchard v. Sweeney*, 109 Ala. 659; *A. L. Co. v. Baker*, 119 Ala. 351. Even if the plaintiff was entitled to recover his damages are the difference between the price he was to pay for the land and its reasonable value at the time of the breach.—*Hammacker v. Coone*, 117 Ala. 611; *Snodgrass v. Reynolds*, 79 Ala. 458; *Kingsheny v. Miller*, 69 Ala. 504. Plaintiff was not entitled to recover for a breach of the contract for failure to convey without showing a tender of performance.—*Galley v. Price*, 16 Johnson, 261; *P. D. & Co. v. Hagler*, 1 Peters, 455. Agency cannot be estab-



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lished by the declarations of the supposed agent.—1 Am. & Eng. Enc. of Law (2nd Ed.) p. 690; *Huntsville Ry. v. Ahatchie Lumber Co.*, 111 Ala. 453; *Foxworth v. Brown* 24 So. Rep.; *Parker v. Bond*, 25 So. Rep. 899; *Womack v. Bird*, 63 Ala. 500; *Sellers v. Commercial Ins. Co.*, 105 Ala. 282; *Buist v. Guice*, 96 Ala. 257; *Tanner v. Hall*, 86 Ala. 305; *Wright v. Evans*, 53 Ala. 104; *Gimon v. Terrell*, 38 Ala. 208; *Gibson v. Snow Hardware Co.*, 94 Ala. 346.

SIMPSON, J.—This was an action by appellant (plaintiff) against the appellee (defendant) to recover damages for the breach of an agreement by the defendant to sell certain real estate to the plaintiff. The complaint alleges: That certain conversations took place between plaintiff and one J. F. Baker, claimed by plaintiff to be the agent of defendant. That after said conversations the defendant telegraphed to plaintiff: "Will let you have property for \$4,000 cash, and proposition made Baker. Wire answer." The plaintiff telegraphed an acceptance of this proposition, and notified defendant that \$4,000 had been placed in the First National Bank of Mobile, which could be drawn on by defendant with papers attached. Also that defendant wired in reply: "Will forward deed and agreement soon as Attorney Smith sends our deed and abstract." The defendant pleaded the general issue, the statute of frauds, and that the plaintiff himself had repudiated the contract and refused to carry out its provisions on his part.

The assignments of error are to the sustaining of certain exceptions to testimony relating to the correspondence between the parties, and a certain deed prepared at the instance of defendant, and which the plaintiff refused to receive. It is clear that, if all the testimony objected to had been admitted, it would simply show telegrams and letters, in neither of which is there any description of the property to be conveyed, nor any statement of the consideration to be paid. The telegram set out in the complaint, besides not giving any description of the land, also states the consideration to be "\$4,000 cash and proposition made Baker." It is evident from the evidence that this latter part of the consideration,

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which was wholly in parol, was the very matter upon which the minds of the parties never met.

If the deed, drawn up at the instance of the defendant, had been admitted, while it would have shown the description of the land, yet it would have also shown defendant's understanding of this other part of the consideration, which the plaintiff entirely repudiates and claims that he never agreed to. In order to a compliance with the provisions of the statute of frauds in regard to contracts, for the sale of real estate, the writings "must state the contract with such certainty that its essentials can be known from the memorandum itself, or by reference contained in it to some other writing, without recourse to parol proof to supply them."—20 Cyc. 258, 260, 270; *Carroll v. Powell*, 48 Ala. 298; *Adams v. McMillan*, 7 Port. (Ala.) 73; *Nelson v. Shelby Mfg. Co.*, 96 Ala. 515, 528, 11 South. 695, 38 Am. St. Rep. 116.

It is clear, then, that if all the testimony which was sought to be introduced had been admitted, and all the testimony objected to by plaintiff had been excluded, it would not have made out a prima facie case for the plaintiff. Hence its exclusion was error without injury, and the court properly gave the general charge in favor of the defendant.

The judgment of the court is affirmed.

TYSON, C. J., and HARALSON and DENSON, JJ., concur.

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**Allen, et al. v. Caldwell, Ward & Co.  
and  
Caldwell, Ward & Co., v. Allen, et al.**

*Action by Broker to Recover Advances Made as the  
Agent of the Principal in a Wager Contract  
Foreclosure.*

(Decided Dec. 20th, 1906. 42 So. Rep. 855.)

1. *Gaming Contract; Futures; Right of Broker to Recover Advances.*—A contract for the sale of cotton on margin, where neither party expects or agrees to receive or deliver the actual cotton sold or bought, is a wager contract under the common law; yet a broker, having no interest in the transaction and not sharing in the profit or loss, is entitled to be reimbursed for advances made for his principal.
2. *Contracts; Legality of Objects; Conflict of Laws; What Law Governs.*—Louisiana not being of common law origin with Alabama, when a contract to be performed in Louisiana is sued on in Alabama, and proof is not made of the laws of Louisiana, the Alabama court will be governed by the statutes of Alabama, when applicable to the facts, it being impossible to apply the common law.
3. *Gaming Contract; Burden of Proof.*—One asserting that a contract is violative of the statute making contracts based on a gambling consideration void, has the burden of proving it.
4. *Payment; Invalidity of Note Given as Evidence of Debt.*—The creditor's right to sue on the debt is not affected by a note given for the pre-existing debt, even if the note was obtained through fraud.
5. *Fraudulent Conveyances; Invalidity as Against Existing Creditors.*—A voluntary conveyance from a husband to his wife is void as to existing creditors.
6. *Same; Effect as to Subsequent Creditors.*—A voluntary conveyance from a husband to his wife is valid, where all of his existing creditors were secured, and it does not appear that he foresaw future liability, as to subsequent creditors, un-

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der the rule that a voluntary conveyance is valid against subsequent creditors in the absence of actual fraud.

7. *Same; Effect of Delay in Recording Conveyance.*—The failure to record a deed voluntarily executed by a husband to his wife is not, of itself, evidence of a fraudulent conveyance, and where consistent with good intentions, the law attributes no bad motive to the grantee.
8. *Same; Action to Set Aside; Sufficiency of Evidence.*—The evidence in this case examined and held not sufficient to show that the deed from the husband to the wife was executed at a later date than is purported on its face, and after the debt to plaintiff was incurred.
9. *Same; Subsequent Creditors; Burden of Proof.*—The burden is on the creditor to show that the deed was actually executed subsequent to the creation of the debt where the deed on its face antedates the creation of the debt.

APPEAL from Montgomery City Court.

Heard before Hon. A. D. SAYRE.

Bill by Caldwell, Ward & Co. against Charles A. Allen and others. Defendants appeal, and plaintiffs file cross-appeal. Affirmed.

This was a bill alleging an indebtedness of \$2,300, contracted in January, 1904, by Allen & Leak, a then partnership composed of Charles Allen and W. W. Leak, and sought to have set aside certain conveyances as fraudulent and void. The case made by the bill is that Allen & Leak became indebted to complainants in January, 1904, and to close same up executed a note payable to complainants in 60 days, and that the said note has not been paid; that some time in 1903 Allen made a conveyance of the property described in the bill to his wife, Eliza Allen, upon a recited consideration of love and affection, and that in 1904, after the note was given, made a conveyance of certain other property to his said wife, for a recited consideration of love and affection; that these conveyances were made to defraud creditors—and sought to have same annulled and subjected to complainants' debt. The bill also alleges that the record of the conveyances was withheld for fraudulent and illegal purposes. Allen admitted the indebtedness, but alleged that it was the result of a gambling deal, by which

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he bought of the complainants cotton on margins; neither party expecting or agreeing to receive or deliver the actual cotton. He denied that the conveyance of the lands was for the purpose of delaying or hindering creditors. The court decreed a sale of the lands mentioned in the last conveyance, and declared a lien on the same in favor of complainants, but declared that the sale prior to the contracting of this debt was not fraudulent and void as to complainants, and declined to declare the conveyance null and void. A cross-appeal followed this decision, and each assign certain portions of the decree as error.

MARKS & SAYRE, for appellant on direct appeal and for appellee on cross.—The law of Alabama governs as to the contract for two reasons. 1st, no proof of the law of Louisiana on the subject was made; 2nd, the notes were payable in this state.—*Peet v. Hatcher*, 112 Ala. 514. The debt was based on a gambling consideration and was void.—*Hawley v. Bibb*, 69 Ala. 52; *Peet v. Hatcher*, *supra*.

GUNTER & GUNTER, and FRED S. BALL, for appellee on direct appeal and for appellant on cross.—No brief came to the reporter.

ANDERSON, J.—From the evidence introduced there can be little or no doubt that Caldwell, Ward & Co. were brokers and agents for a commission in negotiating and executing contracts for the sale of cotton for the firm of Allen & Leak through the New Orleans Cotton Exchange, or that the note was given for the commissions due them and advances made by them to cover losses sustained by the said Allen & Leak by virtue of the transaction. Under the common law, even if such contracts are wagers, if in them the broker has no interest, does not share whatever in the profit and loss, the principal is bound to reimburse him for advances.—*Hawley v. Bibb*, 69 Ala. 52.

It is contended by the appellants (Allen et al.) that, although they might be liable under the common law,

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the contract was for a gambling consideration, and therefore, void, under section 2163 of the Code of 1896, in that it was not within the contemplation of the parties to actually buy and sell cotton, nor to receive or deliver it at the time appointed for the delivery. Conceding that the contracts were to be performed in New Orleans, there has been no proof of the laws of Louisiana; and, it being a state not of common origin with Alabama, we cannot apply the common law, but will be governed by our own statutes, when applicable to the facts, in enforcing and construing contracts in the courts of this state.—*Peet v. Hatcher*, 112 Ala. 514, 21 South. 711, 57 Am. St. Rep. 45; *Kennebrew v. Automatic Machine Co.*, 106 Ala. 377, 17 South. 545. "When the parties agree at the time of making the contract, or the intent is, that no property shall pass, or any delivery be made, but to pay the difference between the price agreed on and the market price at some future day, whatever may be the form of the contract, it is a wager upon the fluctuations of the market, and comes within the denunciation of the statute pronouncing void all contracts founded in whole or in part on a gambling consideration. On the other hand, ownership or possession of the property at the time of making the contract is not essential to the validity of a contract for delivery at some future day, and if the parties understand and intend that the seller shall deliver and the buyer pay for the property at the maturity of the contract, it is a legal and valid transaction, which the law will uphold; and that the seller may have the option to deliver at any time before the maturity of the contract makes no difference."—*Perryman v. Woolffe*, 93 Ala. 290, 9 South. 148; *Hawley v. Bibb*, 69 Ala. 52; *Wall v. Schneider*, 59 Wis. 352, 18 N. W. 443, 48 Am. Rep. 520. The burden of proof was upon the parties seeking to avoid the contract to show that it was violative of the statute, and we agree with the court below in holding that they did not satisfactorily do so.

It is contended by the respondents (Allen et al.) that they were induced to sign the note upon the fraudulent promise of a member of complainants' firm. Should this be true, but which we do not concede, it would not af-

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fect the complainants' right to enforce the collection of the debt. The complainants seek the collection of a debt contracted in January, 1904, and aver that the note was given in February, 1904, simply as an evidence of the debt. The respondents admit in their answer that the debt was contracted by the firm of Allen & Leak, under an agreement with Abercrombia, a member of the firm of Caldwell, Ward & Co., but claim that it was a gambling debt. Moreover, Leak testifies that Allen knew and understood all about the cotton transaction. We have held that it was not a gambling debt, and, as the answer admits that it was a firm debt, it would be immaterial whether the note is binding or not, since each member of the firm would be liable. We do not understand the bill in the case at bar to be a suit upon the note, but one to enforce the collection of the debt evidenced by the note, and to set aside certain conveyances as an incident thereto. The complainants being existing creditors when the deed of February 9, 1903, was made, said conveyance, being voluntary, was void as to them, and the judge of the city court properly subjected the property therein conveyed to the satisfaction of complainant's debt.—*McTeers v. Perkins*, 106 Ala. 411, 17 South. 547.

In discussing the distinction between the rights of existing and subsequent creditors, our court in the case of *Seals v. Robinson*, 75 Ala. 363, said: "It is settled by a long line of decisions in this court that a voluntary conveyance, a conveyance not resting upon a valuable consideration, is void per se, without any regard to the intention of the parties, however free from covin or guile they may have been, as to the existing creditors of the donor, without regard to his circumstances, or the amount of his indebtedness, or the kind, value, or extent of the property conveyed, if it be not exempt from liability for the payment of debts. As to subsequent creditors, if it be not shown that there was mala fides, or fraud in fact in the transaction, the conveyance is valid and operative. But, if actual fraud is shown, it is not of importance whether it was directed against existing or subsequent creditors. Either can successfully im-

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peach and defeat the conveyance, so far as it breaks in upon the right to satisfaction of their debts. This distinction between existing and subsequent creditors is that, as to the former, the conveyance is void per se, for the want of a valuable consideration; as to the latter, because it is infected with actual fraud.—*Miller v. Thompson*, 3 Port. 196; *Cato v. Easley*, 2 Stew. 214; *Moore v. Spence*, 6 Ala. 506; *Costillo v. Thompson*, 9 Ala. 937; *Thomas v. Degraffenreid*, 17 Ala. 602; *Foote v. Cobb*, 18 Ala. 585; *Stokes v. Jones*, 18 Ala. 734, s. c. 21 Ala. 731; *Gannard v. Eslava*, 20 Ala. 732; *Randall v. Lang*, 23 Ala. 751; *Stiles v. Lightfoot*, 26 Ala. 443; *Higgins v. Perrine*, 30 Ala. 396, 68 Am. Dec. 131; *Cole v. Varner*, 31 Ala. 244; *Pinkston v. McLemore*, 31 Ala. 308; *Williams v. Avery*, 38 Ala. 115. The right of the subsequent creditor depends upon the existence of actual fraud in the transaction. The burden of proving it rests upon him.—*Bump on Fraud*, Conn. 308. The general rule applies that fraud must be proved. It will not be presumed, if the facts and circumstances shown in evidence may consist with honesty and purity of intention. But it must not be supposed that fraud must be proved by direct and positive evidence, or that it is incapable of proof by circumstances leading to a rational, well-grounded conviction of its existence. There is no fact which may be the subject of controversy in a judicial proceeding or criminal that is not the subject of proof by circumstantial, as distinguished from positive or direct, evidence. As the fraud vitiating a transaction at the instance of creditors lies in the intention of the parties to it, vicious intent is not generally susceptible of proof otherwise than by evidence of circumstances indicative of it. The intention is a mentale motion of which the external signs are the acts and declarations of the parties, taken in connection with the concomitant circumstances.—*Hubbard v. Allen*, 59 Ala. 283; *Harrell v. Mitchell*, 61 Ala. 270; *Thames v. Rombert's Adm'r*, 63 Ala. 561; *Pickett v. Pipkin*, 64 Ala. 520."

We cannot say that the proof in the case at bar shows, or affords a strong enough inference, that the deed of October, 1903, was made by C. A. Allen for the purpose



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of defrauding his creditors. He practically owed no debts other than those which were secured, and it was not necessary for him to get his other property out of the way. As all the existing creditors were secured, and as Allen seems to have contracted no debts except those growing out of certain cotton transactions, we cannot hold that he anticipated incurring future liabilities, and made the conveyance of October, 1903, for the purpose of defeating creditors not then existing, and who probably never would have existed, had the market gone his way. In order to condemn the deed of October, 1903, we must believe from the evidence that, when it was executed by Allen, he anticipated these deals in cotton, three months later, and that the property was conveyed for the purpose of defeating the collection of debts thus incurred, as the old debts were secured, and the testimony reveals no subsequent ones, other than those growing out of a speculation in cotton in January, 1904. The evidence fails to show that the deed was designedly withheld from the record for the purpose of obtaining credit, which the recording of the instrument would impair. The mere failure to record is not evidence, of itself, of a vicious intent, and where a failure to record is consistent with good intentions the law will attribute no bad motive to the grantee.—*Lehman, Durr & Co. v. Van Winkle*, 92 Ala. 443, 8 South. 870.

It is also contended by counsel that the deed dated October, 1903, was not in fact executed until just before it was filed for record the following April, and was, therefore, subsequent to complainants' debt. If it was not made until after January, 1904, it would, of course, be void as to complainants and would be in the same category with the one heretofore condemned. But the proof is not sufficiently convincing for us to hold that the deed was not made until after January, 1904. It is true the deeds were not recorded until the following April, which is explained by Mrs. Allen. McDade testified as an expert that, when the deeds were filed for record, they had the appearance of being recently written; but such testimony was not sufficient to overcome the evidence of Allen, Mrs. Allen, and the officer, not-

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withstanding the officer is a cousin of Mrs. Allen. Moreover, the testimony of McDade related to both deeds, and if they were prepared and executed just before filing for record, and dated back, it stands to reason that the date of the last one would have also been fixed, so as to antedate complainants' debt. It is true the first deed conveyed the bulk of Allen's property, and that the property conveyed by the last one was mortgaged, and it may have been purposely fixed so as to make it subject to complainants' debt, in order to give a coloring of fairness to the whole matter. But the burden is on the complainants to show that the deed was executed subsequent to the date of the acknowledgment and to their debts, which we are not willing to hold has been done.

The judgment of the city court is affirmed upon both appeals.

Affirmed.

TYSON, C. J., and DOWDELL and McCLELLAN, JJ., concur.

## Brooks v. Romano.

### *Attachment.*

(Decided Dec. 20th, 1906. 42 So. Rep. 819.)

1. *Actions; Misjoinder; Tort and Contract.*—A complaint containing two counts, one for deceit in the sale of goods, and one for a breach of warranty of soundness made on the sale of the goods, is demurrable for a misjoinder of the counts; the first count being case, and the other assumpsit.
2. *Election of Remedies; Sale; Breach of Warranty.*—Plaintiff purchased of the defendant certain goods, and on examination found that they were of inferior quality, and of a different kind contracted for, whereupon plaintiff declined to receive the goods, and so notified defendant. Defendant refused to refund the money paid for them, and refused to take the goods

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back. Plaintiff then took the goods and sued for damages. Plaintiff did not by such action, elect a remedy and thereby estop himself to maintain this action.

APPEAL from Bessemer City Court.

Heard before Hon. WM. JACKSON.

Action by Mike Romano against George W. Brooks. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

This action originated in an attachment proceeding in the justice court, and was removed to the city court, where it was tried upon the following complaint: "Count 1. The plaintiff claims of the defendant the sum of sixty dollars damages for deceit in the sale of one car load of oats, which the defendant at the time of the sale represented to be standard Texas rust proof oats and sound, and which at the time of the sale the defendant knew not to be the quality represented and also to be unsound. Count 2. Plaintiff further claims of the defendant the sum of sixty dollars for the breach of warranty in the sale of one car load of oats by him to the plaintiff on or about, to-wit, the first day of September, 1899, which the defendant warranted to be Texas standard rust proof oats and sound, when in fact the oats were greatly damaged, unsound, and not of the quality sold."

The defendant interposed the following demurrer to this complaint: "(1) Because there is a misjoinder of counts, in that count 1 is in tort for deceit, and count 2 is ex contractu for a breach of a warranty." This demurrer being overruled, the defendant filed two pleas: "(3) That before the commencement of this suit the plaintiff, under the law, had the right to elect, if there was deceit practiced on him as averred in the complaint, as to whether or not he would rescind the contract of sale and reclaim what he had paid for the car load of oats, or retain them and sue for damages; and defendant avers that the plaintiff did elect to rescind, and did rescind, the contract and reclaim what he had paid for the oats in a reasonable time after the sale. Wherefore defendant avers that the plaintiff, having made the election before the commencement of the suit, is estopped

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from maintaining this suit against the defendant. (4) That before the commencement of this suit the plaintiff, under the law, had the right to elect within a reasonable time, if there was a breach of the contract of sale, or fraud in the sale that amounted to a breach of warranty, as to whether or not he would rescind the contract of sale and reclaim the amount he had paid on the oats, by returning or offering to return the property to the defendant, or retain them and sue for the breach of the contract for damages; and defendant avers that before the commencement of this suit the plaintiff did elect to rescind the sale, and did rescind the contract, and claimed a return of the amount he had paid to plaintiff for the property, and that he did this within a reasonable time, and therefore defendant avers that the plaintiff is estopped from maintaining this suit against the defendant. (5) That before the commencement of this suit the plaintiff had the right to elect within a reasonable time after making the purchase, if there was a breach of the warranty or the contract of sale, or if there was fraud or deceit practiced on the plaintiff by the defendant in the sale of the oats, as to whether or not he would rescind the contract, or accept and retain the goods and sue for damages; and defendant avers that before the commencement of this suit, and before the plaintiff received the oats in question, he did elect to rescind and did rescind the sale and claim the return of what he had paid for the oats within such reasonable time, and defendant avers by reason thereof that the plaintiff is estopped from maintaining this action against the defendant."

Demurrers as follows were interposed to these pleas: "(1) Pleas do not set out how plaintiff elected to rescind the sale or contract, whether by suit previously entered or not. (2) Said pleas do not aver that the plaintiff returned the goods and defendant accepted them. (3) Because said pleas do not aver that the defendant agreed to accept a rescission of the sale by the plaintiff. (4) Because the pleas do not in fact show that there was an election to rescind, in that they do set out facts showing that the goods were not kept and disposed of by the plaintiff."

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These demurrers were sustained. The facts upon which the opinion is rested sufficiently appear from the pleadings above set out and the statement of facts in the opinion.

ESTES, JONES & WELCH, for appellant.—The action of appellee amounted to a rescission of the sale and re-invested the title of the oats in Brooks and the right to the price in Romano.—*Hayes v. Woodham*, 40 South. 511; *Rand v. Oxford*, 34 Ala. 476. It is not necessary for the suit to be instituted before a rescission.—*Thompson v. Harvey*, 86 Ala. 510.

TROTTER & ODELL, for appellee.—The presumption is that the second count is like the first and is in tort.—21 Ency. P. & P. p. 656. Both counts are in tort.—*Prout v. Webb*, 87 Ala. 593; *Hallack v. Powell*, 2 Caine (N. Y.) 216; *Nicholas v. Miles*, 6 Johnson, 137.

DENSON, J.—This is the second appeal in this cause. See 142 Ala. 514, 39 South. 213. On the first trial the complaint contained three counts, and a demurrer was sustained for a misjoinder of counts. Judgment was rendered for the defendant on the first trial, from which the plaintiff appealed, and here assigned as one ground of error the ruling of the court sustaining the demurrer to the complaint for misjoinder. In response to this assignment of error, we said: "This first count, which claimed damages for deceit in the sale of a car load of oats, was in case, while the third count, both as originally filed and as amended, counted on a breach of contract in the sale. This constituted a misjoinder of causes of action that made the complaint subject to the demurrer interposed." That was sufficient for the occasion, and the purposes of the court at the time. The nature of the second count in the complaint was not discussed or determined, the exigencies of the case did not require that it should be determined, and the court could not anticipate a return of the case, presenting the question now before us. On the trial of the cause, after the reversal and remandment, the court allowed the defendant to plead over, and he demurred to the complaint on the ground of misjoinder

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with respect to the first and second counts; the third count having been eliminated. The court overruled the demurrer. Judgment was rendered in favor of the plaintiff. Defendant appealed, and here assigns the ruling of the court overruling the demurrer to the complaint as error.

As has been shown, the first count claims damages for deceit in the sale of a car load of oats; while the second counts for recovery on a breach of warranty in the sale. A warranty is nothing more nor less than a contract, and may arise by implication or exist by express agreement. The second avers no breach of duty imposed by the contract of warranty, nor is any deceit averred in promising that the oats were sound. It is obvious that breach of the contract of warranty, and not fraud or deceit, is the gravamen of the second count. Consequently the count is *ex contractu*, and the court erred in overruling the demurrer.—*Romano v. Brooks*, 142 Ala. 514, 39 South. 213; *Whilden v. Merchants' & Planters' Nat. Bank*, 64 Ala. 1, 38 Am. Rep. 1; *Chambers v. Seay*, 87 Ala. 558, 6 South. 341; *Capital City Waterworks Co. v. City Council of Montgomery*, 92 Ala. 366, 9 South. 343; *Western Union Tel. Co. v. Krichbaum*, 132 Ala. 535, 31 South. 607; *Benningsgage v. Ralphson*, 2 Show. 250, pl. 256. The case of *Prout v. Webb*, 87 Ala. 593, 6 South. 190, cited by appellant's counsel, in no wise conflicts with what we have said. Two cases from New York have been cited by appellee. It is shown in the case of *Everton's Ex'rs v. Miles*, 6 Johns. (N. Y.) 138, the two counts in the case of *Hallock v. Powell*, 2 Caines (N. Y.) 216, the first of the New York cases cited, were for deceit, "the one in warranting a distempered horse to be sound, and the other for a like deceit in promising that he was sound." And the court in 6 Johns. 138, said: "The gist of the action, then, was the deceit, and not the contract." And this, of course, warranted the holding there that there was no misjoinder. See, in further criticism of the case, *Lovett v. Pdl*, 22 Wend. (N. Y.) 370. The case of *Everton's Ex'rs v. Miles*, *supra*, may be relied on as authority in support of, rather than against, the conclusion we have reached.

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The car of oats was shipped to the plaintiff, and a bill of lading, with a draft for the purchase money attached, was forwarded to a local bank. Before the carrier would deliver the oats, or allow the plaintiff to examine them, he was required to pay the draft. On examination of the oats they were found to be of an inferior quality, and of a different kind from those contracted for. The plaintiff thereupon declined to remove them from the car, and informed the defendant, who resided in Atlanta, Ga., that he would not accept them, that they were not 'as ordered,' that he could not use them at all, that they were on the railroad track subject to the defendant's order, and he (plaintiff) would not move them. He also drew on the defendant through the Bessemer Savings Bank for the amount he had been required to pay for the oats, and notified the defendant of his draft. The defendant refused to refund the money paid by the plaintiff, and refused to take the oats back. The plaintiff then took the oats and instituted this suit. These facts were set up in special pleas by the defendant in answer to the action, upon the theory of election of remedies and estoppel in pais. The court sustained the demurrers by the plaintiff to the pleas, but on the trial, which was before the court without a jury, the defendant had the benefit (under the general issue) of the matters set up in pleas. The judgment of the court is assigned as error by the defendant, as is also the ruling of the court on the demurrers to the pleas. In this state of the case, ordinarily, we would not discuss the defense brought forth by the pleas; but, as a reversal must follow for the error already pointed out, it is important, for the purposes of another trial, that we determine the merits of the defense.

No other suit than the one here being prosecuted has been instituted by the plaintiff, so it seems clear that the only remedy chosen by the plaintiff is the one involved in this action. "Although acts prior to the actual commencement of legal proceedings indicate an intention to rely upon one remedial right, yet they do not constitute an election which will preclude the subsequent prosecu-

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tion of an action or suit based upon an inconsistent remedial right, unless the acts constitute an estoppel in pais. 15 Cyc. p. 260, E, and authorities cited in note 58; *Orman v. Lane*, 130 Ala. 305, 30 South. 441; *Hunnicut v. Higginbotham*, 138 Ala. 472, 35 South. 469, 100 Am. St. Rep. 45. What is said in *Thompson v. Harvey*, 86 Ala. 519, 5 South. 825 (the authority relied on by the defendant), does not militate against what we have here said. If the plaintiff here had sued for the money back that he had paid, it would have been necessary for him to have shown a rescission or an offer to rescind. And it is true, as was said in that case, "an offer to return the chattel in a reasonable time, on the breach of warranty, or where fraud has been practiced on the purchaser, is equivalent, in its effect upon the remedy, to an offer accepted by the seller, and the contract is rescinded." But here the defendant declined to accept the offer, and he certainly should not be allowed to say, in the face of such a declination, 'there was a rescission. To constitute a rescission in fact, it required the concurring assent of both parties.—*Robinson & Ledyard v. Pogue*, 86 Ala. 257, 5 South. 685. "In order to create an estoppel in pais, the party pleading it must have been misled to his injury; that is, he must have suffered a loss of a substantial character or have been induced to alter his position for the worse in some material respect."—16 Cyc. p. 744; *Moore v. Robinson*, 62 Ala. 537; *Hopper v. McWhorter*, 18 Ala. 229; *Carter v. Darby*, 15 Ala. 696, 50 Am. Dec. 156; *Adler v. Pin*, 80 Ala. 351. It is manifest, from the facts of this case, that, in the light of the principle above stated, the defendant cannot invoke the doctrine of estoppel; and we are at the conclusion that the doctrines of election of remedies and estoppel are not applicable, and the evidence failed to make good such defense.

It is not necessary to the trial of the cause on remandment that we should consider the rightfulness or not of the judgment of the court on the facts. For the error pointed out, the judgment of the court must be reversed, and the cause remanded.

Reversed and remanded.

TYSON, C. J., and HARALSON and SIMPSON, JJ., concur.



[Mayor and Aldermen of Birmingham v. O'Hearn.]

## Mayor and Aldermen of Birmingham v. O'Hearn.

### *Prosecution for Violating City Ordinance.*

(Decided Dec. 20th, 1906. 42 So. Rep. 836.)

1. *Municipal Corporations; Ordinances; Violation; Prosecution.*—The statement of a cause of complaint filed by the city attorney in the appellate court does not supply the defect arising from a failure to file and furnish on demand of defendant a written complaint in the police court.
2. *Same; Written Complaint; Sufficiency.*—The entry by a police judge on his docket of the charge against one prosecuted for a violation of a city ordinance, cannot take the place nor perform the office of a written complaint charging the violation.
3. *Same.*—Under the common law, by the statutes, and under the Constitution, one is entitled to a written complaint setting forth the charge, whether the prosecution is a criminal offense or a civil action or partakes of the nature of both.
4. *Same; Waiver.*—A person charged with the violation of a municipal ordinance, waives his right to demand a written complaint if he proceeds to trial in the police court without making such demands.
5. *Same.*—A city is not liable for the costs of the prosecution on the acquittal of one charge with the violation of the city ordinance in an appellate court.

APPEAL from Jefferson Criminal Court.

Heard before Hon. D. A. GREENE.

J. E. O'Hearn was acquitted in the criminal court on a charge of having violated an ordinance of the city of Birmingham, and the mayor and aldermen of the city appeal. Reversed, corrected, and, as corrected, affirmed.

E. D. and J. Q. SMITH, for appellant.—Municipal prosecutions are quasi criminal only and do not come within the terms of constitutional provision that the criminal has the right to demand the nature and cause

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of the accusation.—*Withers v. The State*, 36 Ala. 252; *Williams v. Augusta*, 49 Ga. 509; *McEnnery v. Denver*, 17 Col. 302; *Greelcy v. Harrimon*, 12 Col. 94; *Ex parte Slattery*, 3 Ark. 484; *Hill v. Mayor, etc.*, 72 Ga. 314; *State v. Robitshek*, 60 Minn. 123; *Monroe v. Hardy*, 46 La. 1232. There is nothing in the common law which requires in actions of this character that a formal complain in writing be preferred.—15 A. & E. Ency. P. & P., p. 412; 4 Blackstone 280; McQuillan's Munic. Ordinances, secs. 303-305-322; Dillon's Munic. Corp. 410; 411. Our court had never held the necessity for a formal written complaint.—*Brown v. Mobile*, 23 Ala. 722; *Mobile v. Rouse*, 8 Ala. 515; *Ahlich v. Cullman*, 130 Ala. 439; *Furman v. Huntsville*, 54 Ala. 263; *Case v. Mobile*, 30 Ala. 438; *Goldthwaite v. Montgomery*, 50 Ala. 486.

GASTON & PETTUS, for appellee.—The arrest in this case was clearly without authority of law and void.—*In re Way*, 41 Mich. 304; *Quinn v. Heisel*, 40 Mich. 376; 2 A & E. Ency. of Law, 869. An officer cannot arrest without warrant for a violation of a municipal ordinance not committed in his presence.—3 Cyc. 883, notes 81-2 and 3; *Shanley v. Webb*, 71 Ill. 78. Municipal courts derive their authority from legislative enactment and their procedure must be in conformity to the state or common law unless provided otherwise in their charter.—15 Ency. P. & P. 411. At common law no authority existing for the arrest of the party without a warrant for misdemeanor except a breach of the peace committed in the presence of an officer.—3 Cyc. 883-4; 15 Ency. P. & P., 423; 4 Blackstone, p. 237. No warrant shall issue to seize any person without probable cause supported by oath or affirmation.—Sec. 5, article 1, Const. 1875; *Williams v. The State*, 44 Ala. 43; *Washington v. The State*, 82 Ala. 31; *Ex parte Thomas*, 100 Ala. 102. The statutes of the State regulate the method of making arrests.—Secs. 5209-5210 and 5211. These sections apply to a policeman or town marshal.—*Ex parte Bizzell*, 112 Ala. 214; *Martin v. The State*, 89 Ala. 118; *Hayes v. Mitchell*, 69 Ala. 453; *Williams v. The State, supra*; *Jones v. The State*, 100 Ala. 90; *Gambill*

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*v. Schmuck*, 131 Ala. 331. There is no authority granted in the charter to a policeman to arrest without a warrant.

TYSON, C. J.—The appellee was arrested by a police officer of the city of Birmingham without a warrant for violating an ordinance of said city making vagrancy an offense. No complaint of any kind was filed in the police court charging him with this offense. He was forced to submit to a trial against his objections, simply upon a statement entered upon the docket of the police judge, showing his alleged offense to be that of violating section 622 of the City Code, coupled with the oral statement of the police judge that section 622 of the City Code defined the offense of vagrancy and provided for its punishment. The judge, in response to defendant's demand for a copy of the accusation against him and to know the nature of the accusation, offered to furnish to his counsel a copy of the docket entry, which was refused, because insufficient and not in compliance with law. Upon the court's refusal to furnish a complaint, or any further copy of the accusation than the copy of the docket entry, the defendant's discharge was demanded and denied. After the conviction, on appeal, the question of the right and jurisdiction of the police court to proceed in the manner indicated above was raised and adjudged by the appellate court to have been erroneous, resulting in the discharge of the defendant.

It will scarcely be doubted that, if a written complaint was necessary in the police court to a proper hearing and determination of the case, the statement of the cause of the complaint filed by the attorney for the municipality in the appellate court was totally ineffectual to supply the defect.—*Miles v. State*, 94 Ala. 106, 11 South. 403; *Butler v. State*, 130 Ala. 127, 30 South. 338. Nor can it be doubted that the entry upon the docket of the police judge was entirely wanting in the essential requisites of a complaint, should it be conceded that the entry could, under any circumstances, perform the office of a complaint. So, then, the correctness of the rulings here sought to be reversed are dependent upon the solution of the question whether the defendant was

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entitled, upon demand, to be apprised of the nature and character of the proceeding instituted against him by a written complaint. If the proceeding was for the prosecution of a criminal offense, the right "to demand the nature and cause of the accusation and to have a copy thereof" was secured to him by the Constitution.—Article 1, § 6, of the Constitution of 1901; *City of Selma v. Stewart*, 67 Ala. 338, 340; *Telheard v. City of Bay St. Louis*, (Miss.) 40 South. 326. If it was in its nature and character purely civil, his right to a written complaint was secured by the statute. If it was neither civil nor criminal, but partook of the nature of both, then the right was secured by the common law, in the absence of a statute depriving him of it. It is not insisted that any such statute exists.—Horr & Bemis on Municipal Ordinances, § 172; McQuillan on Municipal Ordinances, § 314; *Prell v. McDonald*, 7 Kan. 426, 12 Am. Rep. 423, and authorities there cited. See, also, *Case v. Mayor of Mobile*, 30 Ala. 538; *Town of Camden v. Bloch*, 65 Ala. 236. So, then, whatever point of view we may take of the proceedings in the police court, the defendant's demand for a complaint could not be rightly denied him, and the holding of the criminal court on this point was correct. It may not be amiss to say that, had the defendant proceeded to trial in the police court without making the demand for a complaint, he would be held to have waived it.—*City of Selma v. Stewart*, *supra*; *Aderhold v. Mayor, etc., of Anniston*, 99 Ala. 521, 12 South. 472.

It appears from the judgment that the municipality was taxed with the costs, and execution was awarded against it. In this there was error, for which the judgment will be reversed and corrected.—*City of Selma v. Stewart*, *supra*, and authorities there cited.

Reversed and corrected, and, as corrected, affirmed.

HARALSON, SIMPSON, and DENSON, JJ., concur.

[City Council of Montgomery v. West.]

## City Council of Montgomery v. West.

### *Violating City Ordinance.*

(Decided Jan. 23, 1907. 42 So. Rep. 1000.)

**Municipal Corporations; Ordinances.**—An ordinance forbidding the operation of steam engines, planing mills, foundries, blacksmith shops, etc., within the city limits, without first obtaining the consent of the Council, is invalid, in that it fails to prescribe a uniform rule of action but reserves to the Council the right to grant or withhold the privilege arbitrarily.

APPEAL from Montgomery City Court.

Heard before Hon. A. D. SAYRE.

John West was prosecuted for violating an ordinance of the city of Montgomery. From an order of the city court sustaining a demurrer to the complaint, the city appeals. Affirmed.

C. P. MCINTYRE, and HILL, HILL & WHITING, for appellant.—The ordinance was within the power granted by the city charter.—Secs. 2, 3, 6, 7, 12 and 39, Charter of City of Montgomery. Things that are not nuisances per se may become so by reason of the manner and character of the use of a place where conducted.—*Kinney v. Kooperman*, 37 L. R. A., 497; *Grossman v. City of Oakland*, 36 L. R. A. 393 and note. The city had the right to prohibit under the charter, and if so, they had a right to regulate.—*St. Louis v. Fisher*, 167 Mo. 654; *Quincy v. Kennard*, 151 Mass. 563. The fact that the ordinance provided that a permit must be obtained from the city council does not make it invalid.—*St. Louis v. Fisher*, *supra*; *Wilson v. Eureka*, 173 U. S. 32; *In re Flaherty*, 27 L. R. A. 529; *Ex parte Fisk*, 72 Cal. 123; *Olympia v. Mam*, 12 L. R. A. 150. The court will presume that the municipality will act impartially in granting permits.—*St. Louis v. Fisher*, *supra*; *In re Flaherty*, *supra*; *State ex rel. etc. v. Mead*, 71 Mo. 272; *St. Louis*

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*v. Howard*, 119 Mo. 47. The city has power to pass an ordinance to prevent the erection of steam boilers without permit.—*Wadleigh v. Gillhan*, 12 Me. 403; City Charter.

STEINER, CRUM & WEIL, for appellee.—One of the primary and fundamental principles, by which municipal ordinances will be measured, according to the great weight of authority, is that, notwithstanding express power to enact, may exist, *any* ordinance placing restrictions upon "*common rights*," "*lawful conduct*," or the "*lawful use of property*," must, in order to be valid, "*specify the rules and conditions to be observed in such conduct or business, and must admit to the exercise of the privilege, of all citizens alike, who will comply with such rules and conditions, and must not admit of the exercise, or of the opportunity for the exercise, of any arbitrary discrimination by municipal authorities, between citizens who will so comply*," and whether or not an ordinance does conform to this principle, is, of course, always a question for the determination of the courts.—*City of Richmond v. Dudley*, (Ind.), 28 Am. St. Rep., 180 and note; *State v. Tenant* (N. C.), 28 Am. St. Rep. 715; *Noel v. People*, (Ill.), 79 Am. St. Rep. 238; *State v. DuBarry*, 44 La. Ann., 1117 (11 So. Rep. 718); *Matter of Frazee* (Mich.), 6 Am. St. Rep. 310; *Plymouth v. Schulties*, 135 Ind. 139; *State v. Deffes*, 45 La. 658 (12 So. Rep. 841); *Mayor, et al. v. Radecke* (Md.), 33 Am. Rep. 239; *Bills v. City of Goshen*, 117 Ind. 221; *City of Newton v. Belger*, 143 Mass. 598; *State v. Mahner*, 43 La. 496 (9 So. Rep. 480); *City of St. Paul v. Laidler* (Minn.), 72 Am. Dec. 89; *Rochester v. West* (N. Y.), 79 Am. St. Rep. 659; *Town of Greensboro v. Ehrenreich*, 80 Ala. 579; *Yick Wo v. Hopkins, etc.*, 118 U. S. 356, (30 L. Ed.); *Barthet v. City of New Orleans*, 24 Fed. Rep. 563; 1st *Smiths Mod. Law of Municipal Corporations*, (1903), Secs. 526-7 and 530; McQuillan on Municipal Ordinances, ss. 432, 438 and 184; Freud on Police Power, ss. 611 and 641, 643, 644; Cooley's Constitutional Limitations, pps. 270-78-80-91; *State of La. v. Robertson* (La.), 20 L. R. A. 691; *Crawford v. City of*

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*Topeka* (Kan.), 20 L. R. A. 692; *City of Janesville v. Carpenter* (Wis.), 8 L. R. A. 808.

Language better calculated to enable the Council to arbitrarily control the business or occupations mentioned in this ordinance, without reference to any fixed or known rules, cannot be well imagined. *Any* rule which *admits* of an invidious discrimination will be conducive to oppression and fraught with wrong and injury.

HARALSON, J.—Section 295, for the alleged violation of which, the defendant was arrested, tried by the recorder of the city, and fined, the validity of which ordinance, on appeal from the city court, we are to consider, reads: “No person shall set up or operate a steam engine, a planing mill or planing machine, foundry, blacksmith shop, cotton gin, bakery, an establishment for boiling soap, or any similar establishment within the city, without first obtaining the consent of the council,”—providing a penalty for any one violating the ordinance.

Defendant assails the validity of the ordinance, on the ground, that it does not prescribe “a general, uniform rule, condition or regulation, to which all citizens, similarly situated, may conform, “but reserves to the city council the right to grant or withhold the privilege, as may suit its pleasure, and admits of the opportunity for the exercise of an arbitrary discrimination, and because it is contrary to the fourteenth amendment of the Constitution of the United States.

The ground on which the municipality seeks to uphold the ordinance, is,—quoting from brief of its counsel,—that section 2 of the charter, prescribes that the “city council may do and perform any other acts incident to bodies corporate.” Section 6: “The city has power to suppress all nuisances in the manner directed by the city council at the expense of the person causing the same or upon whose premises the said nuisance is found, on public or private property.”

The last of these,—the sixth,—seems to be the only one which approaches the delegated power under which the ordinance in question can rest. Certainly, it cannot rest in said section 2.

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"It is the policy of the law to require municipal corporations to act strictly within their delegated powers, and no power can be exercised when it is not clearly comprehended within the words of the act conferring it, or derived therefrom by necessary implication."—*Norris v. Town of Oakman*, 138 Ala. 415, 35 South. 450; *Decatur v. Berry*, 90 Ala. 433, 7 South. 838, 24 Am. St. Rep. 827; 1 Dillon on M. Corp. § 89; 15 Am. & Eng. Ency. Law (1st Ed.), 1041.

"A stationary steam engine is not of itself a nuisance, even if erected and used in the midst of a populous city, unless it interferes with the safety or convenience of the public in the use of the streets."—*Mayor v. Radecke*, 49 Md. 217, 33 Am. Rep. 239.

In Smith on the Modern Law of Municipal Corporations, § 526, in defining conditions to be considered in determining the validity of an ordinance, it is laid down, that the ordinance "must be impartial and general in its operation. So far as it restricts the absolute dominion of the owner over its property, it should furnish a uniform rule of action, and its application cannot be left to the arbitrary will of the governing authorities." The citations to support the text, are very numerous. Again, the same author in section 530, observes: "Ordinances which invest a city council, or a board of trustees, or officers, with a discretion which is purely arbitrary, and which may be exercised in the interest of a favored few, are unreasonable and invalid."

In *City of Richmond v. Dudley*, 129 Ind. 112, 28 N. E. 312, 13 L. R. A. 587, 28 Am. St. Rep. 180, after reviewing the authorities on the subject it was held, to be well established therefrom, "that municipal ordinances, placing restrictions upon lawful conduct, or the lawful use of property, must, in order to be valid, specify the rules and conditions to be observed in such conduct of business; and must admit of the exercise of the privilege by all citizens alike who will comply with such rules and conditions; and must not admit of the exercise, or of an opportunity for the exercise, or any arbitrary discrimination by the municipal authorities between citizens who will so comply." To the same effect is *State*



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*v. Tenant*, 110 N. C. 609, 14 S. E. 387, 15 L. R. A. 423, 28 Am. St. Rep. 715.

So, it has been held, that an ordinance was invalid, which made it unlawful to maintain a slaughter house, "except permission be granted by the council of the city of New Orleans," as it made the owner's right to maintain the business, dependent upon the arbitrary will of an individual or a body of individuals, acting for the city; that the city has no governmental or special power to prevent any one, who complies with the law regulating such business, from engaging in any lawful business he prefers, and the ordinance in question, would enable the city to allow the favored suitor to establish a monopoly.—*Barthet v. City of New Orleans*, (C. C.) 24 Fed. 567; so, of an ordinance of the city of New Orleans, forbidding the keeping of dairies within certain limits, except by permission of the city council—*State v. Mahner*, 43 La. Ann. 496, 9 South. 480; and an ordinance of the city of Newton, to exercise a discretion in granting or refusing a permit for the erection of buildings within a fire district—*City of Newton v. Belger*, 143 Mass. 598, 10 N. E. 464.

An elaborate discussion of the principle will be found in the case of *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220, to the same effect as the authorities *supra*

The question came before our court, in the case of *Town of Greensboro v. Ehrenreich*, 80 Ala. 579, 583, 2 South. 725, 60 Am. Rep. 130, in respect to an ordinance to prevent the introduction of infectious or contagious diseases and preserve the health of the inhabitants, making it unlawful for any person, "to import, sell or otherwise deal in second-hand or cast off garments, blankets, bedding or bed clothes." In was there said: "Municipal authorities having power to abate nuisances, cannot absolutely prohibit a lawful business not necessarily a nuisance, but may abate it when so carried on as to constitute a nuisance. They cannot, under the claim of exercising the police power, substantially prohibit a lawful trade, unless it is so conducted as to be injurious or dangerous to the public health. \* \* \* We cannot regard

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it a legitimate exercise of the power conferred by the act of incorporation."

From the foregoing, it will appear that the city court committed no error in sustaining the demurrer to the complaint.

**Affirmed.**

TYSON, C. J., and SIMPSON and DENSON, JJ., concur.

## Mayor, etc. of Ensley v. Cohn.

### *Action for Violating City License Ordinance.*

(Decided Jan. 15th, 1907. 42 So. Rep. 827.)

1. *Statutes; Titles of Act; Constitutional Requirement.*—The title of the act was: "An act to amend Section 1 of an act entitled 'An act to amend Section 1 of an act entitled an act to establish a new charter for the city of E.'" Held, a sufficient compliance with Section 45 of the Constitution of 1901.
2. *Same; Local Laws; Notice of Intention to Apply For; Sufficiency.*—Notice in this case examined, and it is held that the substance of the proposed law, which was the altering or rearranging of the boundaries of the city, was sufficiently set forth in the notice, and the act is valid, although the notice stated the proposed territorial lines which were not followed, but were changed in the act as passed.
3. *Same; Validity; Partial Invalidity.*—Where part of an act which is objectionable on constitutional ground, can be eliminated without affecting the purpose of the act, or its integrity, it will be done, and the valid and unobjectionable part be permitted to stand.
4. *Licenses; Municipal Corporation; Incorporation under Special Act.*—The general acts of incorporation has no application to a case of a violation of the city ordinance for carrying on business without license, where the city was incorporated by special act of the legislature.

APPEAL from Jefferson Criminal Court.

Heard before Hon. M. M. BALDWIN.

Action by the mayor and city council of Ensley against T. A. Cohn for the violation of a city ordinance

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prohibiting the carrying on of any licensed business without such license. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

This case was tried upon the following agreed statements of facts: "That said defendant did engage in a business in Tuxedo Park during June and July, 1905, for which a license was required by the ordinance of said city of Ensley, without having taken out a license therefor from the said city of Ensley, as charged by said mayor and city council of Ensley. That the said place in which defendant so engaged in said business is in territory included and embraced in each of two acts of the Legislature of Alabama described as follows, viz: (1) 'An act entitled "An act to amend section 1 of an act entitled 'An act to establish a new charter for the city of Ensley in Jefferson county, Alabama,' " approved February 28, 1903' (Loc. Acts 1903, p. 107) ; and (2) an act entitled 'An act to alter or rearrange the boundaries of the city of Ensley, Jefferson county, Alabama,' approved September 30, 1903 (Id. p. 692.) That neither of said acts change the police jurisdiction of the city of Ensley relative to the railroad property described therein. That no railroad property was included in the territory embraced in said act of February 28, 1903. That the lines published in the notice of said February act embrace Sherman Heights, Nineteenth street, and several hundred acres, none of which was included in the said act of February 28, 1903. That said place in which defendant so engaged in business was not in the corporate limits of the city of Ensley prior to said February act. That the following ordinance of the city of Ensley, Alabama, was in force and operation at the time defendant so engaged in said business as aforesaid. That, if either of the above described acts, approved, respectively, February 28, 1903, and September 30, 1903, are constitutional, defendant is guilty as charged; but, if both of said acts are unconstitutional and void, then defendant is not guilty. Code of Ensley, Alabama, c. 4, § 601: 'Engaging in or Carrying on Business Without out a License.—No person, firm, or corporation shall after the 10th of January in any year engage in or carry on in the city any business for which a license is

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required, unless licensed. And any person violating any of the provisions of this section must upon conviction be fined not less than one nor more than one hundred dollars.'” This was an action by the city of Ensley against the defendant for the violation of the city ordinance for doing business without procuring license therefor in the corporate limits of the city of Ensley.

ROMAINE BOYD, for appellant.—The court erred in its judgment holding that the act of Feb. 1903, was unconstitutional. This holding is based upon the facts that the advertised notice of intention to apply did not conform substantially to the provisions of the act as passed. It is only a clear violation of the Constitution which would justify the court in overruling the legislative will. Every intendment is in favor of the validity of the act.—*State ex rel. Hanna v. Tunstall*, 40 South. 135; *Mobile Dry Dock Co. v. Mobile*, 40 South. 205; Cooley’s Const. Limitations (6th Ed.) 318. The construction must not be strict.—*State ex rel. v. Street*, 117 Ala. 207. The notice was sufficient.—*Law v. The State*, 38 South. 800; *Ex parte Black*, 40 South. 133; *State ex rel. Corington v. Thompson*, 38 South. 579; *Brame v. The State*, 38 South. 1031. The act of September, 1903, is not subject to the objections urged.—*Law v. The State, supra*.

A. LEO OBERDORFER, for appellee.—The act of Feb. 28, 1903, (Local Acts 1903, p. 107) is violative of section 45 of the Constitution of 1901. It is also violative of section 104, subsection 118 of the Constitution of 1901. It is violative of section 106 of the Constitution of 1901, as the notice is not sufficient.—*Hudgins v. The State*, 39 South. 717; *Brame v. The State*, 39 South. 1031; *Lancaster v. Gafford*, 139 Ala. 372; *Tillman v. Porter*, 38 South. 647; *Alford v. Hicks*, 38 South. 752.

DOWDELL, J.—This case was tried in the court below on an agreed statement of facts. The question presented for our consideration involves the constitutionality of two acts of the Legislature, viz: (1) “An act to amend section 1 of an act approved March 2, 1901, entitled ‘An act to amend section 1 of an act entitled

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"An act to establish a new charter for the city of Ensley in Jefferson county, Alabama," " approved February 28, 1903. Loc. Acts 1903, p. 107. (2) An act entitled "An act to alter or rearrange the boundaries of the city of Ensley, Jefferson county, Alabama," approved September 30, 1903. Loc. Acts 1903, p. 692. By the agreed statements of facts it is admitted "that if either of the above-specified acts, approved, respectively, February 28, 1903, and September 30, 1903, is constitutional, defendant is guilty as charged; but, if both of said acts are unconstitutional and void, then the defendant is not guilty."

The first objection raised to the act of February 28, 1903, relates to the title. It is insisted that in this respect the act is violative of section 45 of the Constitution, which provides that "each law shall contain but one subject, which shall be clearly expressed in its title, except general appropriation bills, general revenue bills, and bills adopting a Code, digest or revision of statutes; and no law shall be revived, amended, or the provisions thereof extended or conferred, by reference to its title only; but so much thereof as is revised, amended, extended or conferred, shall be re-enacted and published at length." The subject expressed in the title of the act in question is to amend section 1 of a former act, specified in the title. This has been repeatedly held by this court to be a sufficient compliance with, and not violative of, the constitutional provision. Section 1 of the act approved March 2, 1901 (Acts 1900-01, p. 1940), proposed to be amended by the act approved February 28, 1903, relates solely and exclusively to the territorial limits and boundary of the city of Ensley. Section 104 of the Constitution of 1903 provides: "The Legislature shall not pass a special, private, or local law in any of the following cases." Then follows an enumeration of 31 cases, numbered in subdivisions from 1 to 31, inclusive. Subdivision numbered 18 reads as follows: "Amending, conferring or extending the charter of any private or municipal corporation, or remitting the forfeiture thereof; provided, shall not prohibit the Legislature from altering or rearranging the boundaries of any city, town, or village." It is plain, from the proviso contain-

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ed in the foregoing subdivision 18, that it is left within legislative power to alter or rearrange the boundaries of any city, town or village.

The next question is whether the act in question is invalid by reason of a failure to comply with the provisions of section 106 in reference to the publication of notice of the intention to apply for the passage of the act. It is insisted that the territorial boundaries of the city of Ensley contained in the act as passed are not the same, but different from the boundaries contained in the published notice of the intention to apply for the act, and for this reason it is urged that no notice was given of an intention to apply for the act as passed, and that therefore there was a failure to comply with the requirements of section 106. In construing section 106 in connection with sections 104 and 105, it may be questioned whether, in cases of the altering or rearranging the boundaries of any city, town, or village, notice is required to be given of an intention to apply for the passage of such a law. But the necessities of the present case do not require us to decide this question. The substance of the proposed law in the present case is the altering or rearranging of the boundaries of the city. This was contained in the published notice of the intention to apply for the passage of the act, and, conceding that it was necessary to give the notice as required in section 106 of the Constitution, this would have been sufficient, without giving in minute detail and particularly the course and bearings of the boundary line. What was said, and the principle there stated, in *Law v. State*, 142 Ala. 62, 38 South. 798, finds ready application here. There can be no distinction in principle in the two cases on the question under consideration. See, also, *Ex parte Black*, 144 Ala. 1, 40 South. 133. The published notice having given the substance of the proposed law—the altering or rearranging of the boundaries of the city of Ensley—the fact that notice was also given of the proposed territorial lines, which were not followed, but were changed in the act as passed, does not invalidate the act or affect the principle above stated, since the fact remains that the notice given contained the substance of the law as enacted. The foregoing

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views are not in conflict with the decision in the case of *Brame v. State*, (Ala.) 38 South. 1031. The facts in that case readily differentiate it from the case before us.

The bill as passed did not include in the city limits the railroad mentioned in the advertised notice. The proviso at the conclusion of section 1 of the act, in reference to the taxation of the railroads mentioned therein, is without any field of operation, since in the act as passed these railroads are not within the city limits, and may, therefore, be stricken out without affecting the main purposes of the act or its integrity. The rule is well settled that whenever a part of an act, objectionable on constitutional grounds, can be eliminated without affecting the purpose of the act or its integrity as a whole, this will be done, and the valid and unobjectionable part be permitted to stand. Such is the case here. The provision in the act in reference to the railroads can be eliminated and the balance permitted to stand without in the slightest affecting the integrity of the act as a whole.

The city of Ensley was incorporated by special act of the Legislature, and not under the general statute relating to the incorporation of towns, etc.; and hence the general statute has no application in this case.

The foregoing views bring us to the conclusion that the act of February 28, 1903, is free from constitutional objections, and, therefore, a valid law; and, under the agreed statement of facts, this conclusion renders it unnecessary to the determination of this case to consider the constitutionality of the act of September 30, 1903. It follows that the judgment must be reversed, and the cause remanded.

Reversed and remanded.

TYSON, C. J., and ANDERSON and McCLELLAN, JJ., concur.

[City of Bessemer v. Dickens.]

## City of Bessemer v. Dickens.

### *Violation of City License Ordinance.*

(Decided Feb. 6, 1907. 43 So. Rep. 21.)

*Licenses; Violation of; Carrying on Business.*—In the absence of evidence to show that a sale was made, one cannot be convicted for engaging in or carrying on a business, to do which a license is required; mere preparations to engage in or carry on such business will not warrant a conviction.

APPEAL from Bessemer City Court.

Heard before Hon. WILLIAM JACKSON.

G. C. Dickens was acquitted of violating an ordinance of the city of Bessemer against engaging in or carrying on a business to do which a license was required, and the city appeals. Affirmed.

W. F. PORTER and BEN G. PERRY, for appellant.—Counsel discuss assignments of error but cite no authority.

W. K. SMITH, for appellee.—Counsel discusses questions presented but cites no authority.

McCLELLAN, J.—The appellee was, after his appeal from the mayor's court, acquitted, upon trial in the city court without jury, of all alleged violation of an ordinance against engaging in or carrying on a business to do which a license was required.

The assignments of error insisted on are directed against the propriety of the court's action in discharging appellee. The judgment of the city court must be affirmed, since the bill of exceptions fails to show that a sale was made by appellee.—*Abel's Case*, 90 Ala. 631, 8 South. 760. Mere preparation to engage in or carry on a business in violation of such ordinances is not sufficient to warrant a conviction.

Affirmed.

TYSON, C. J., and DOWDELL and ANDERSON, JJ., concur.



[Henry v. Brannan.]

**Henry v. Brannan.***Ejectment.*

(Decided Dec. 20th, 1906. 42 So. Rep. 995.)

1. *Ejectment; Plaintiff's Title.*—In ejectment plaintiff must show a regular chain of title back to some grantor in possession or to the federal government.
2. *Public Lands; Swamp Lands; Conveyance by the State.*—The State was without authority to issue a patent to swamp and overflow lands under Acts 1861, p. 2, until such lands had been patented by the federal government to the State, or certified by authority of the State as belonging to it.

APPEAL from Mobile Circuit Court.

Heard before Hon. SAMUEL B. BROWNE.

Action by Mary Henry against Lewis I. Brannan. From a judgment for defendant, plaintiff appeals. Affirmed.

ERVIN & MCALEER, for appellant.—The patent showed that the final receipt having been issued and the land paid for which vested the title in Henry.—Sec. 1813, Code 1896. Where the description is wholly uncertain proof cannot be made of what was intended.—*Kennedy Stave Co. v. Schloss*, 34 South. 373. Identification must be by proof of facts.—*Bernstein v. Humes*, 71 Ala. 269. Either of the two pieces of land were embraced in the description of defendant's deed.—*Vann v. Lunsford*, 91 Ala. 580. Court of law cannot correct a mistake in the deed.—*Guilmartin v. Wood*, 76 Ala. 204; *Donohue v. Johnson*, 120 Ala. 445; *Hereford v. Hereford*, 32 South. 620.

McINTOSH & RICH, for appellee.—The documentary evidence was entirely insufficient to support plaintiff's title and the court would have been warranted in giving defendant the affirmative charge.—*Carl v. The State*,

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125 Ala. 89. It was incumbent upon the plaintiff to go further than to introduce the state's patent. He should have proven that title had passed out of the government into the state.—*Carl v. The State, supra*; *Florence B. & I. Asso. v. Schall, et al.*, 107 Ala. 531.

TYSON, C. J.—Statutory action by appellant in the nature of an action of ejectment. In order for plaintiff to make out her case, it was necessary that she should have shown a regular chain of title back to some grantor in possession or to the United States government.—*Florence B. & I. Association v. Schall*, 107 Ala. 534, 18 South. 108; *Carl v. State*, 125 Ala. 89, 28 South. 505. No proof of possession by plaintiff, or by any grantor in the chain of documentary title introduced in evidence, was offered; nor did the documentary evidence of title introduced go as far back as the United States government.

There was a patent introduced from the state to the plaintiff's father, under whose will she claimed title as devisee. This patent purports to have been issued under any by virtue of the authority conferred by the act of the General Assembly approved February 8, 1861 (Acts 1861, p. 12) entitled "An act for the sale of the swamp and overflowed lands of the state of Alabama and for other purposes." Under that act the state was without authority to issue the patent to the plaintiff's father until the land had been patented by the government of the United States or certified by authority of this state as belonging to it. In order, therefore, to show that the state acquired the title to the land, and therefore conveyed it by the patent, it was necessary to show a documentary title from the United States government. This not being done, the plaintiff failed to make out a *prima facie* case, and the affirmative charge could well have been given for the defendant.

It follows, therefore, that all rulings of the trial court in admitting evidence offered by the defendant tending

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to support his claim of title to the lands and the giving of charges at his request, if erroneous, were without injury.

**Affirmed.**

DOWDELL, ANDERSON, and MCCLELLAN, JJ., concur.

## Strickland, et al. v. Griswold, et al.

### *Ejectment.*

1. *Deeds; Delivery to Take Effect on Grantor's Death.*—Irrespective of the place where the deed was kept, the title to the land passed at the time of delivery, where the grantor gave the deed to one of the grantee's therein with instructions to keep it in a certain box, and deliver it to the proper parties at his death.
2. *Same; Jury Question.*—When the grantees in a certain deed claimed under a deed alleged to have been delivered to one of them by the grantor to be delivered to the proper parties, the question of delivery was a question for the jury to determine. (Haralson and Simpson J.J., dissent.)

APPEAL from Bullock Circuit Court.

Heard before Hon. A. A. EVANS.

Action by S. P. Griswold, and others against Susan M. Strickland and others in the nature of ejectment. The facts sufficiently appear in the opinion of the court. There was judgment for plaintiff and defendant appeals. Reversed and remanded.

R. L. HARMON and D. S. BETHUNE, for appellant.—The legal effect of the transaction between the father and the daughters was to invest the daughters not only with the legal title to the land but with immediate right of possession.—*Williams v. Higgins*, 69 Ala. 522; *Hargrave v. Membourne*, 86 Ala. 273. If it was the purpose of the grantor to reserve the right to use the land as a means of support during his life this did not prevent

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the passing of a legal title or affect the validity of the delivery of the deed.—Authorities supra; American & Eng. Ency. of Law (2d Ed.), Vol. 9, page 157; *Foster v. Mansfield*, 3rd Metcalf (Mass.) 412, s. c. 37 Am. Dec. 154; *Wheelwright v. Wheelwright*, 2 Mass. 454; *Hatch v. Hatch*, 9 Mass. 310; 6 Am. Dec. 67; *Prewitt v. Ashford*, 90 Ala. 301; Vol. 11 Am. and Eng. Ency. of Law (2nd Ed.), 346, 347 and notes 4 and 5 on page 346 and notes 1, 2 and 3, page 347; *Davis v. Clark*, 58 Kan. 100; *Arrington v. Arrington*, 122 Ala. page 516; *Bury v. Young*, 98 Cal. 446, s. c. 35 Am. State Reports 186, on page 187, et seq.; *Stephens v. Rhinehart*, 72 Penn. State 434; *Hathaway v. Payne*, 34 N. Y. 92; *Stone v. Duvall*, 77 Ill. 475.

J. D. NORMAN, for appellees.—To pass title it must have been a deed and it must have been executed and delivered by Griswold prior to his death. The intention of the maker is the ultimate object of inquiry determining the character of the paper.—*Croker v. Smith*, 94 Ala. 297. It was competent in determining this matter to ascertain instructions given the draughtsman.—*Sharpe v. Hall*, 86 Ala. 114. The circumstances attending the execution and delivery of the paper all indicate a testamentary intention.—Authorities supra. Delivery is an essential part of the deed.—*Fitzpatrick v. Brigman*, 130 Ala. 454. As long as it remains under the control of the grantor it cannot be said to have been delivered.—9 A. & E. Ency. of Law, (2nd Ed.) p. 155-6. The delivery must be made during the lifetime of the grantor.—*Richardson v. Woodstock Iron Co.* It may be shown that the deed was handed to the grantor for a particular purpose.—*Cherry, et al. v. Herring*, 83 Ala. 462.

SIMPSON, J.—This was a suit by the appellees (plaintiffs), in the nature of an action of ejectment, to recover an undivided interest in certain lands formerly belonging to J. J. Griswold, the ancestor of both plaintiffs and defendants. The plaintiffs claimed as heirs at law of said J. J. Griswold, and the defendants claimed under the paper set out in the record, being Exhibit A to the deposition of George S. Rotten.

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The undisputed evidence is that said J. J. Griswold signed this paper in the presence of the attesting witness, and at that time delivered it to his daughter, Amanda, one of the grantees named in the paper, telling her to put it away, to be delivered to the proper parties at the time of his death, and she put it in a tin box and kept it until she was married. At the time he gave it to her he designated a tin box in which he kept his valuable papers, and said "he wanted it placed there." In 1896, after Amanda Griswold had married and gone to Texas, J. J. Griswold took this deed out of the tin box and delivered it to Susan Griswold, the other grantee, telling her that it was to be given to the proper parties at his death. She put the deed in the box, in which were kept valuable papers of J. J. Griswold. Said Susan Griswold testified that said deed was in her possession from that time until after the commencement of this suit when she handed it to her attorney; that her said father died in 1900; that she lived with him, kept house for him, waited on him, and looked after his papers till his death; that "the deed in question was kept in her father's house, in a trunk, in the tin box, until after her father's death, except at such times as she and her father went away from home on a visit, or something of the kind; that at such times as they went away from home they took the tin box with them;" also that she collected the rents of the land in question during the years 1899 and 1900, and gave her sister, Amanda, half of the money, and kept the remainder herself, and has so continued up to this time. Mrs. Turnipseed testified that, in December, 1896, she saw J. J. Griswold open a tin box, and take some papers from it, and hand them to Susan Griswold, telling her that they were deeds; that one was a deed conveying some land to her sister Emma (which is shown to be the name by which Amanda Griswold was called); and that the other was a deed to her brothers, Kinchen, Ben, and Charlie. "He told her to keep the deeds and take care of them, and at his death to deliver them to the proper parties." She also testified that afterwards J. J. Griswold pointed out the lands to her as the lands he had given to his daughters, Susan and Emma. G. D. Griswold, a brother of Susan, testified that

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he rented the lands in question from his father, and held them under the lease till after his death; that he paid the rent in 1899 and 1900 to Susan Griswold, and she surrendered his notes to him. The plaintiffs introduced three witnesses, P. D. Moore and S. B. and J. O. Griswold, who testified that at their father's house, shortly after his death, they heard Susan (their sister) state that "the deed in question was kept during her father's life in his tin box, in his trunk, with his other papers, and after his death she took it out of the box and gave it to her brother, Kinchen. This is denied by Mrs. Susan (Griswold) Strickland.

The paper marked "Exhibit A" is in form a deed, and has nothing in it to indicate that it was intended as a will. The evidence is clear and uncontradicted that it was delivered by J. J. Griswold to his daughter, the appellant, Susan Griswold Strickland, with instructions to her to deliver it and the other deed to the proper parties at the death of J. J. Griswold. "The delivery of a deed by the grantor to a third person, to be held by him and delivered by the grantee, upon the grantor's death, will operate as a valid delivery, where there is no reservation, on the part of the latter, of any control over the instrument."—13 Cyc. 569; *Owen v. Williams*, 114 Ind. 179, 15 N. E. 678, 684; *Stout v. Rayl*, 146 Ind. 379, 45 N. E. 515, 517. In the case last cited the court reviews several cases, and declares that such a deed takes effect from the instant of delivery, and, quoting from 3 Washburn on Real Property, (5th Ed.) pp. 319, 320, draws the distinction between such a deed, which depends merely upon the lapse of time for its delivery, and an escrow, which is dependent upon the performance of some condition, which may not be done.—Page 517. In our own court, in a case where the grantor delivered a deed, conveying lands to his minor children, to his wife, telling her to look after the children if he died first, and that he would look after them if she died first, it was held that the title passed eo instante.—*Arrington v. Arrington*, 122 Ala. 510, 26 South. 152; *Williams v. Higgins*, 69 Ala. 517; *Abney v. Moore*, 106 Ala. 131, 18 South. 60.

Even if such a delivery could be denominated an escrow, it is "firmly established that a deed cannot be

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delivered to the grantee (or one of them), to be held by him as an escrow, and to become valid and binding as a conveyance only on the happening of an event to transpire afterward." Such delivery amounts to an absolute delivery of the deed, and while proof may be allowed to show that the deed was not really delivered to said grantee, and that he came into possession of it in some improper way, after it had been delivered to a third party in escrow, yet, if the delivery was in fact to the grantee, it cannot be shown that it was in escrow.—*Cherry, Smith & Co. v. Herring*, 83 Ala. 458, 3 South. 667; *Shelby v. Tardy*, 84 Ala. 327, 330, 4 South. 276; *Hargrave v. Melbourne*, 86 Ala. 270, 272, 273, 5 South. 285; *Tiedeman on Real Property*, § 815. There is nothing in the cases cited by counsel for appellees which militates against the principles above set forth.—*Sharpe v. Hall*, 86 Ala. 110, 5 South. 497, 11 Am. St. Rep. 28, was one in which the instrument itself reserved "the use, control, and consumption" of the property during his natural life, and was kept by the maker until her death. In *Crocker v. Smith*, 94 Ala. 295, 10 South. 258, 16 L. R. A. 576, the instrument itself reserved a life estate and enjoyment in the grantor "and for the payment of all my just debts," and provided that it was to take effect at his death. No delivery was proved, and the instrument was admitted to probate as a will. In the case of *Fitzpatrick v. Brigman*, 130 Ala. 450, 30 South. 500, the instrument was simply left by the maker of it in the hands of his attorney, with no instructions to deliver it to any one. It matters not where the deed was kept, after it was delivered to Mrs. Strickland. The delivery, being completed, conveyed the title, though the enjoyment of the estate was postponed. It results that the court erred in giving the general charge in favor of the plaintiffs.

Justice HARALSON and the writer are of the opinion that the court also erred in refusing to give the general charge in favor of the defendant; but the other members of the court hold that it was a question to be submitted to the jury whether or not the deed was delivered to the appellant Susan M. Strickland.—*Griswold v. Griswold*, 148 Ala. 239, 42 South. 554.

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The judgment of the court is reversed, and the cause remanded.

TYSON, C. J., and DOWDELL, ANDERSON, DENSON, and McCLELLAN, JJ., concur. HARALSON and SIMPSON, JJ., dissent in part.

## Henry v. Frohlichstein.

### *Ejectment.*

(Decided Feb. 14th, 1907. 43 So. Rep. 126.)

1. *Pleading; Amendment; Change of Parties.*—Since a tenant in common, although entitled to only an undivided interest in land, may try the title thereto, it is not an amendment working an entire change of parties to permit plaintiff to strike from the complaint the words "individually and as guardian for a lunatic, and for the use of said lunatic" co-tenant.
2. *Appeal; Objection to Introduction of Evidence in Trial Court; Sufficiency.*—One desiring to take advantage of the provisions of Section 1531, Code 1896, should object to the introduction of the deeds because not corresponding with the abstract furnished, and cannot present the error on appeal in the absence of such objection.
3. *Trial; Reception of Evidence; Statement of Counsel as to Expected Proof; Exclusion of Evidence.*—Where the court properly admitted a deed as color of title upon statement of counsel that proof of possession under it would be made, if such proof is not made, the party objecting to its introduction should move to exclude it, if he desires to put the court in error.
4. *Appeal; Taking Objection in Trial Court; Necessity of Showing Same in Bill of Exceptions.*—This court will not review, on appeal, objections to the introduction of evidence, in the absence of a showing in the bill of exceptions that objection was offered to it in the trial court, and exception reserved to the court's action.
5. *Ejectment; Evidence of Plaintiff's Title; Adverse Possession.*—Where plaintiff claimed title through the adverse possession of



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her father, deeds from her sisters and brothers to her were admissible to show that whatever possessory title her father had was vested in her.

6. *Evidence; Admissibility; Conclusion.*—It is competent in an action of ejectment, to ask a witness how long a certain person lived on the land "claiming to hold" it for another person named.
7. *Adverse Possession; Color of Title; What Constitutes; Possession of Part; Claim to Whole.*—In order to constitute a deed color of title, the grantee must have taken possession of a part of the land therein described, claiming title thereunder to the whole.
8. *Ejectment; Directory Verdict; Evidence; Jury Question.*—Evidence in this case examined and stated and held not to authorize a direction of a verdict for the plaintiff, as the question of adverse possession, under it, was one for the jury.

APPEAL from Mobile Circuit Court.

Heard before Hon SAMUEL B. BROWNE.

Action in the nature of ejectment, begun by Amelia Frollichstein against Mary Henry, the facts concerning which are sufficiently stated in the opinion of the court. There was judgment for plaintiff and defendant appeals. Reversed and remanded.

ERVIN & MCALEER, for appellant.—The rule being universal that a plaintiff in ejectment must show title back to the government or to some one in possession, the court should have sustained the objection to the deed made by Chandler to Peters.—*Jackson Lumber Co. v. McCreary*, 137 Ala. 281; *Florence B & I. Asso. v. Schall*, 107 Ala. 531. The plaintiff not having shown actual possession must show legal title.—*R. R. Co. v. Tutwiler*, 108 Ala. 483. A mortgage recorded for over twenty years was presumed to be satisfied.—*Goodwin v. Baldwin*, 59 Ala. 128. The judgment against Peters did not bind defendant or show any title against her.—*Camp v. Forrest*, 13 Ala. 117. The court should have sustained objection to the question to the witness Kimball.—*Ashford v. Ashford*, 136 Ala. 640. The court erred in permitting the amendment.—*Crumpp v. Wallace*, 27 Ala. 280; *Whitlow v. Echols*, 78 Ala. 206; *Saelye v. Smith*, 85 Ala. 25; *Oates v. Beckwith*, 112 Ala. 359; *Dake v.*

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*Sewell*, 39 South. 819. A plaintiff whose title terminates pending suit cannot recover.—*Davis v. Curry*, 85 Ala. 134; *Chandler v. Yost*, 81 Ala. 411; *Hairston v. Dobbs*, 80 Ala. 589; *Scranton v. Ballard*, 64 Ala. 402. The statute of amendment is to cure insufficiently or defects in pleading and not to introduce new causes of action.—*Mayhan v. Smitherman*, 71 Ala. 567. Plaintiff's charge required a finding as to certain lands not sued for and certainly not shown to have been in possession of plaintiff and is, therefore, erroneous.—*Shipman v. Baxter*, 21 Ala. 458; *Henry v. Brown*, 143 Ala. 457; *Turner v. Stevenson*, 2 L. R. A. 277.

GREGORY L. & H. T. SMITH, for appellee.—Although a party may derive his title to different parts of land from different sources, yet, if the tracts adjoin each other and there is no one but the claimer residing thereon such occupation extends the possession to the entire tract.—*Ritch v. Braxton*, 158 U. S. 375; *Wharton v. Bunting*, 73 Ill. 16; *Harrison v. McDaniel*, 2 Dana; *Hole v. Rittenhouse*, 25 Pa. St. 491; *Alston v. Collins*, 2 Spear, 450. One holding under color of title and being in possession of a part of the holding only is not confined to his possession but his possession is referred to his color of title provided, the land is contiguous.—*Aniston City Land Co. v. Edmondson*, 127 Ala. 460; *Smith v. Kyser*, 115 Ala. 459; *Zundell v. Baldwin*, 114 Ala. 335; *Burke v. Mitchell*, 78 Ala. 61; *Ryan v. Kirkpatrick*, 66 Ala. 332; *Brady v. Huff*, 75 Ala. 80; *Childress v. Calloway*, 76 Ala. 128; *Ewing v. Burnett*, 11 Peters, 41; *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417. The court did not err in allowing the amendment.—*Dorland v. Westervitch*, 140 Ala. 283; *Sedgwick & Waite on Trial and Title to Land*, Sec. 300 and note. The court did not err with reference to Kimball's testimony.—*Dorland v. Westervitch*, *supra*.

SIMPSON, J.—This was a statutory action of ejectment, originally brought by the appellee, "individually and as guardian of Fannie Frolichstein, a lunatic, and for said lunatic's use," against the appellant. During the progress of the case the complaint was amended by

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striking out the words "individually and as guardian of Fannie Frolichstein, a lunatic, and for said lunatic's use," thus converting the action into the suit of the plaintiff alone in her individual capacity. Appellant claims that this was introducing a new cause of action, and not allowable, and that the allowance of it was fatal to the right of the plaintiff to recover. Section 3331 of the Code of 1896 has been construed by this court to allow any amendment, by striking out or adding parties or otherwise, with the only limitation that "there must not be an entire departure from the process, an entire change of parties, or the introduction of an entirely new cause of action."—*Sanders v. Knorr*, 57 Ala. 80, 83; *Berry v. Ferguson*, 58 Ala. 314, 316; *Harris v. Swanson*, 62 Ala. 299; *Sou. Express Co. v. Boullemet*, 100 Ala. 275, 278, 13 South. 941; *Lowery v. Rowland*, 104 Ala. 420, 426, 16 South. 88; *Lucas v. Pittman*, 94 Ala. 616, 620, 10 South. 603; *Weeden v. Jones*, 106 Ala. 336, 339, 17 South. 454. A comparison of the facts in the foregoing cases shows that the amendment in this case did not introduce a new cause of action, as contended by the appellant. The plaintiff, as tenant in common, is entitled to try the title to the property, just as all the parties originally could. The fact that she is entitled to only an undivided interest of the property does not change the cause of action, within the statute of amendments.—*Dorlan v. Westervitch*, 140 Ala. 284, 294, 37 South. 382, 103 Am. St. Rep. 35.

The defendant (appellant) makes the point that the evidence introduced by the appellee (plaintiff) did not correspond with the abstract of title which had been furnished to defendant by plaintiff. We do not find that objection was made to the introduction of the evidence on that ground, but the only way in which it seems to have been brought up was that the defendant offered the abstract in evidence, and it is not set out in the bill of exceptions, but it is merely stated that it contained certain statements. If the defendant had desired to take advantage of the provisions of section 1531 of the Code of 1896, he should have objected to the introduction of the deeds on that ground.—*L. & N. R. R. Co. v. Massey*, 136 Ala. 156, 33 South. 896, 96 Am. St. Rep. 17.

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The defendant objected to the introduction of the deed from Daniel Chandler to Fred Peters, on the ground that it had not been shown that Chandler ever had possession of or title to the land. The plaintiff then stated "that he expected to show possession under the deed in question for more than 40 years, and also that Chandler claimed under Mr. Thomas Henry, and that Henry knew that fact, and was the same Henry under whom the defendant was now claiming." It is true that, when a deed is offered as color of title, it is incumbent on the party who offers it to show that the purchaser entered and claimed under it.—*Nat. Bank of Augusta v. Baker Hill Iron Co.*, 108 Ala. 636, 19 South. 47. Yet, on the statement made by counsel, the court could in its discretion admit the deed, and, if the promised proof was not afterwards made, the defendant should have moved to exclude the deed, if he desired to insist upon that point. What has just been said applies, also, to the objection to the introduction of the mortgages from Peters to Frolichstein.

The bill of exceptions does not show that any objection was offered by the defendant to the introduction of the "certified copy of the record and judgment including a writ of possession by Frolichstein against Peters." The plaintiff was seeking to show by evidence that a title had matured in her father by adverse possession, and it was proper to show that whatever possessory title had been held by her father had vested in her. Hence it was proper to admit the deeds from her sisters and brother to her.

The question to the witness Leroy Kimball, "How long did he live on it claiming to hold for Frolichstein?" was proper, and the objection to it properly overruled. The court holds that this is not equivalent to the question as to whether a third party knew a thing, as in the case of *Ashford v. Ashford*, 136 Ala. 633, 640, 34 South. 10, 96 Am. St. Rep. 82, but has been recognized as allowable under previous decisions of this court.—*Eagle & Phoenix Co. v. Gibson*, 62 Ala. 369. The same question to the witness Cox comes under the same category. Besides, he did not answer it.

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The defendant had brought out evidence of the proceedings in court by which the interest of Fannie Frollichstein had been conveyed to Fiebleman, and it was not erroneous to allow the plaintiff to prove that said interest had passed from Fiebleman to the plaintiff, Amelia Frollichstein. But, from what has been heretofore said on the amendment of the complaint, it is evident that the evidence did not affect the case.

The court, at the instance of the plaintiff, gave the general charge in favor of the plaintiff as to a portion of the land sued for, and therein set forth. The defendant assigns this as error, and the plaintiff contends that it was proper, and that, as a consequence, any errors that may have been committed were errors without injury. Hence it becomes necessary to analyze the testimony. The land described in the charge and in the verdict consists of the E. 1-2 of section 26, and W. 1-2 of section 25 (which according to the testimony of the surveyors constitutes what is known as "section 37"), the S. E. 1-4 of section 24, and N. E. 1-4 of section 25. Nothing is said by any of the witnesses about either of the grantees, mentioned in either of the deeds, entering into possession under the deed; but, admitting that evidence that a party held the deed and at the same time was in possession of a part of the land described is sufficient to infer that he was holding under the deed, yet, in order to constitute either deed color of title, it is at least necessary to prove that the party to whom it was made was in possession of some part of the land and claiming it all.—*Nat. Bank of Augusta v. Baker Hill Iron Co.*, 108 Ala. 636, 639, 19 South. 47.

The first deed introduced is that of Chandler to Peters—Exhibit A. That deed describes section 37 and S. E. 1-4 of section 24; also "N. W. Div. A. of fraction 25, and Div. A. of frac. section 25, containing 5 acres." Whether the first call as to section 25 was meant for fractional section, or where "Div. A of frac. section 25" is, the record does not show. So that deed could not furnish color of title to any land in section 25, except what was comprehended in section 37, and in order to show color of title to that which is described, it was necessary to show possession of some part by Peters, and that

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he claimed the entire tract. The evidence on that point was that Peters, about 1866, lived "on the right-hand side of Rapid creek, one of the prongs of Dog river, in range 2, but don't remember the township, and built a house there; remained there till 1871, or '72, when he was served with notice from Frolichstein to move away, and he did so. A man named Browning took possession, and held it for Frolichstein until 1876 of '77, when he was served with notice (from witness), and left." According to another witness, Peters lived "on section 25" about 48 years; had about 15 or 20 acres in cultivation, claimed it as his, and remained there 25 or 30 years, and a man named Browning (who the witness thinks "held for Frolichstein," he said so) did not live on the place, but lived "on the S. 1-2—the W. 1-2 of section 24," and remained there six or seven years, and a colored man lived on section 25 at the same time, and "he held for Frolichstein." The witness Kimball says Peters lived "down on Dog river, township 5, range 2 west. He was cutting wood, bringing it to town, and Frolichstein was selling it; do not know from what portion or section of land he cut wood; only know the wood was brought from Dog river." Witness Dock Smith says Peters lived "on Dog river and cultivated land on sections 24 and 25 from about 1860 till about the 70's. He cultivated 15 or 20 acres, and cut wood from sections 28 and 23. He had a man on section 27 who cut wood and cultivated in N. E. 1-4 of section 26. All of the land was open, unfenced, piney woodland, except where Peters lived, and except in section 26. It was not called 26 and 27. It was called 37." The witness Williams was employed by Fiebleman and paid by Miss Frolichstein to put up warnings against trespassers on lands in that neighborhood, but he cannot say what particular portions were posted; thinks the "lands were separated—not all in one batch." He does not say when this was done, except that it was after Frolichstein's death. The remaining witness could not describe the land on which Peters and Browning lived, nearer than that it was "on Dog river," and it was called the "Frolichstein place," or it was at the "three forks," or that he was living "between the L. & N. R. R. and the river," and

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the map does not show an "L. & N. R. R." So it is evident that, not only was there a failure of color of title as to the N. E. 1-4 of section 25, but as to the remainder of the land the proof was not so definite and conclusive as to what land Peters was in possession of, to authorize the court to take the consideration of that question from the jury as to Peters' possession.

The next is the deed of Peters to Simon Frolichstein (Exhibit B) which does not describe any of the lands included in the charge. It does mention "Frac. N. E. 1-4 of sec. 25," but does not state in what township it is, and the other lands therein mentioned are said to be in section 13 and section 39; one of these last being in range 2 and one in range 1. So this deed cannot operate as color of title to any land.

The next paper offered is a mortgage from Peters to Simon Frolichstein (Exhibit C), dated April 24, 1867, which describes the land as section 37, bounded on the east by Dog river, etc., and the S. E. 1-4 of section 24 (with other property not involved in this suit), from which, according to the map in evidence, the greater part of N. E. 1-4 of section 25 is omitted, even allowing that the mention of the boundary could extend section 37 into said N. E. 1-4 of section 25 at all. There is nothing to show that this mortgage was ever foreclosed, or that possession was taken of the land on default of payment. On the contrary, the mortgage being in possession of the plaintiff, and no showing that anything was done under it for more than 20 years, the presumption would be that it was paid.

The lease of the small five-acre tract by Peters, and the release of dower by Mrs. Chandler, also the quit-claims of all interest, not describing any lands—Exhibits H and I—do not show anything about the possession of the land in question. Besides the fact, heretofore noticed, that a portion of the land is not described in the instruments claimed as color of title, it will be seen that the evidence is not at all definite as to just what land either Peters or Browning was in possession of. Dog river, of course, does not designate any particular section, and, when it is said that Peters lived on section 25, there is nothing to show what part of the sec-

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tion; and, while Browning is placed on section 24, the witness distinctly states that it was on the west side, while the only part of 24 claimed is the S. E. 1-4. There is no direct proof of any possession by either of the Frolichsteins, but merely statements that Peters was notified to leave by Simon Frolichstein, and that some of the parties who held possession of undescribed lands claimed to hold for him, and that Amelia Frolichstein sent a man to put up notices; but he could not testify where he put them, except on some of the detached portions not claimed in this suit. There is no proof as to who has been in possession since Browning left about 1877, and one of the witnesses states that he does not know of any one living there since that time. These being the facts, the court erred in giving the general charge in favor of the plaintiff.

The judgment of the court is reversed, and the cause remanded.

TYSON, C. J., and HARALSON and DENSON, JJ., concur.

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### *Ejectment.*

(Decided Dec. 20th, 1906. 43 So. Rep. 26.)

1. *Evidence; Proof of Pedigree; Declarations; Admissibility.*—To render competent the declarations of a person with respect to the pedigree of another person, it is necessary to show that the declarant was a member of the family to which it is sought to attach the third person.
2. *Same.*—Where it was shown that the person testifying lived in Switzerland, and that his mother died there, his testimony stating that his mother stated that her sister lived in the United States, and that she used to receive letters from her, but that his knowledge of the fact that decedent's maiden name was the family name of his mother and that decedent married, was from documents received from Alabama, does not show a dec-



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laration of his mother, that decedent was a member of her family, and was inadmissible to show whether the decedent, dying while living in Alabama, was a sister of the mother of the witness, who died in Switzerland.

APPEAL from Mobile Circuit Court.

Heard before Hon. SAMUEL B. BROWNE.

Ejectment by Rudolph Scheidegger and others against Joshua D. Terrell. From a judgment of nonsuit, plaintiffs appeal. Affirmed.

See 39 South. 172.

Frederick Scheidegger, in answer to interrogatory propounded to him in this cause, among other statements, said: "I live in Berne, Switzerland. I speak German. I did not know Magdalena Kronenberg, who formerly lived in Mobile, Ala., personally; but my mother did." The following parts of his interrogatories were stricken on motion of the defendant: "My mother used to speak of her to us children, and frequently to remark that her sister was in the United States, and she received letters from her. From documents in the English language which I have seen, and which were correctly translated to me, I know that Magdalena Kronenberg's maiden name was Ritter, and that she was married to Edward Kronenberg in 1858 in Mobile by J. R. Eastburn, a justice of the peace. From such documents I know that Magdalena Kronenberg, born Ritter, died in July, 1865, at 48 Spring Hill Road, Mobile, Ala. Magdalena Kronenberg (or Madeline as I understand it to be in English) left no issue of her body, but surviving her remained the following: Myself, my brother Simon, and Rudolph Scheidegger, we being nephews of the deceased, Magdalena Kronenberg, and Elizabeth Ritter, also a niece. My mother, who was a sister of Magdalena Kronenberg, and Elizabeth Ritter, whose father was a brother of Magdalena Kronenberg. My mother and her father are both deceased. The three persons above named, together with myself, are next of kind to the deceased, Magdalena Kronenberg. Magdalena Kronenberg's maiden name was Ritter, and her father, Ulreich Ritter, baptized at Trachselwald, October 19, 1789, and who was buried there April 4, 1837. Her mother was Maria Zur-

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cher, baptized at the same place October 13, 1799. Magdalena Kronenberg, born Ritter, was baptized at the same place July 11, 1824." Rudolph Scheidegger answered the interrogatories in practically the same manner as did the other witness, and the answers to the above interrogatories above set out were suppressed. The testimony of Johann Baertschi was that he answered from English documents translated to him. He also testified that with the intimate family relationship between himself and the family of Ritter, he did not know the original Magdalena Kronenberg. All this testimony having been suppressed, the plaintiff took a nonsuit, with bill of exceptions.

ERVIN & MCALEER, and JOHN R. THOMPSON, for appellant.—As to pedigree hearsay testimony is admissible.—Wigmore on Evidence, sec. 1480; 1 Greenleaf on Evidence, 114; 1 Rice on Evidence, 413; *Rowland v. Ladiga*, 21 Ala. 9; *Cherry v. The State*, 68 Ala. 30; *Elds v. The State*, 124 Ala. 70. The rule as to filiation is laid down in *Weatherford v. Weatherford*, 20 Ala. 554; see also 15 A. & E. Ency. of Law (2nd Ed. p. 315). The declarations of a person since deceased that he was going to visit relatives at a certain place are admissible to show that the family had relatives there.—1 Greenleaf (6th Ed.) 201; *Russellton v. Nesbit*, 2 M. & R. 554. We, therefore, insist that the court erred in suppressing the deposition.

GREGORY L. & H. T. SMITH, and STEWART BROOKS, for appellee.—As to genealogy hearsay evidence is never admissible except to prove declaration of deceased persons.—*White v. Strother*, 11 Ala. 724. A witness cannot give his opinion of the effect of the declaration but can only repeat the declarations as made.—*Rogers v. Debardeleben*, 97 Ala. 156; *Cherry v. The State*, 68 Ala. 29; 1 Greenleaf, 103; Taylor on Evidence, 648; 16 Cyc. p. 1123 and 1130. A witness not a member of the family cannot testify at all as to the family reputation.—16 Cyc. 1224 and 1233. It must affirmatively appear that the declarant actually knew the facts.—16 Cyc. 1229. It is within the discretion of the nisi prius court to grant

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or refuse a continuance.—*Humes v. O'Brien*, 74 Ala. 78; *Spann v. Torbitt*, 130 Ala. 541; *Stephens v. The State*, 138 Ala. 72; *Kroell v. The State*, 139 Ala. 11.

SIMPSON, J.—This is an action of ejectment (under the statute) for the recovery of certain real estate, the plaintiffs claiming as the heirs of one Madeline Kronenberg, wife of Edward Kronenberg. The point of contention is whether or not said Madeline Kronenberg is identified as the same person as Madeline Ritter, who left Switzerland years ago and came to the United States. The court below excluded certain parts of certain depositions, a nonsuit was taken, and this appeal thereon.

The contention of the appellant is that those parts of the depositions which were suppressed should have been admitted, under the rules of law, which permit hearsay testimony to a certain extent in matters of pedigree. The principles of law are few and well understood on this question, to-wit: That, in matters of pedigree, the general repute in the family may be testified to by a member of the family; also that declarations by the deceased himself, and declarations by persons who are shown by other evidence to be members of the family, may be proven, provided such members are dead. Such declarations by members of the family must be made, either upon what said members know to be the general repute in the family, or on what said members have heard other members of the family say. A declaration which merely expresses information collected from persons not qualified to be declarants, or from other sources than family tradition, or the statements of other members of the family who knew the facts, is not admissible. It is also true that, where a declaration of a member of the family is sought to be proved, the declaration itself should be proved, and not the declaration of the witness from it.—1 Elliott on Evidence, §§ 336, 371; *Stein v. Bowman*, 13 Pet. (U S.) 209, 10 L. Ed. 129; *Chapman v. Chapman*, 2 Conn. 347, 7 Am. Dec. 277; *Jackson v. Browner*, 18 Johns (N. Y. 37; *Wise v. Wynn*, 59 Miss. 588, 42 Am. Rep. 381; *Young v. State*, (Or.) 59 Pac. 812, 47 L. R. A. 548; 16 Cyc. 1130, 1228, 1229;

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22 Ency. Law, pp. 641, 642, 650; *In re Hurlburt's Estate*, 68 Vt. 366, 35 Atl. 77, 35 L. R. A. 794, 800; *Rogers v. De Bardeleben Coal & Iron Co.*, 97 Ala. 154, 156, 12 South. 81.

The testimony of Frederick Scheidegger shows that he had no personal knowledge at all of Magdalena Ritter, or of Madeline Kronenberg. While he states that his mother used to "speak of her to us children," yet, when he came to relate what his mother actually said, it was simply that "her sister was in the United States," and that she "used to receive letters from her." There is no fact in his testimony, no repute in the family, and no declaration of any member of the family, which tends to show that Magdalena Ritter and Madeline Kronenberg were one and the same person. He states distinctly that his knowledge of the fact that Madeline Kronenberg's maiden name was Ritter and that she married Kronenberg was from the documents from Mobile in the English language, which has been translated to him. Hence these parts of his testimony noted as "stricken," being evidently derived from these sources, were properly suppressed.

The point of the third ground of objection to this testimony is not that the person making the declarations, to-wit, the mother of the witness, is not shown to be a member of the family of Madeline Kronenberg, for, of course, that is the thing to be proved by the statements, and it would be only necessary to show that the declarant was a member of the family to which it is sought to attach Madeline Kronenberg by her statements; but the point is that the "hearsay statements do not consist of declarations" of such a person having knowledge of the facts. If the witness had testified that he had often heard his mother say that she had a sister living in Mobile, Ala., whose name was Madeline Kronenberg, and that her husband was named Edward Kronenberg, and that they called her Madeline, in English, in place of Magdalena, as she was originally called, then that would have been properly admitted as a statement of a member of the family; but, as before shown, the witness does not testify to any such statements, but only to his own inferences that Madeline Kronenberg was

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"born Ritter," etc., because his mother said that she had a sister in the United States and he had seen certain translations of English documents from Mobile.

Under the same principles, those parts of the testimony of Rudolph Sheidegger hereinbefore noted as "suppressed" were properly excluded by the court, as were also those portions of the deposition of Johann Baertschi noted herein as "suppressed."

These are all the points noted in the brief of appellant.

The judgment of the court is affirmed.

TYSON, C. J., and HARALSON and DENSON, JJ., concur.

## Buford v. Christian.

*Trespass Quare Clausum Fregit.*

(Decided Jan. 2, 1907. 42 So. Rep. 997.)

1. *Appeal; Harmless Error; Pleading.*—Any error in striking special pleas is rendered harmless where the matters set up therein were admitted under the general issue.
2. *Same; Admission of Evidence.*—Defendant was not prejudiced by the admission of evidence as to his acts on the land after the commencement of the suit where the recovery was for nominal damages only.
3. *Same; Failure to Present Question Below.*—Where instructions, if misleading, could have been cured by requested instructions in the court below, but no such request was made, it was harmless error to give them.
4. *Trespass; Right of Action; Plaintiff's Possession.*—The fact that plaintiff's tenant, without notice to plaintiff, attorned to the defendant, did not destroy plaintiff's possession so as to preclude her from maintaining an action of trespass.
5. *Trial; Instructions; Application to Evidence.*—Where the evidence showed that the defendant's acts were not acts of adverse possession but were purely trespasses, it was proper to refuse an instruction to the effect that there should be a verdict for the defendant if he was in adverse possession of the lands.

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6. *Appeal and Error; Trial Court's Discretion.*—The action of the presiding judge whether he certifies or refused to certify under the provisions of Section 1326 of the Code, so as to fix the amount of costs on plaintiff in excess of the amount of judgment or not, is not reviewable on appeal; nor can the action of the judge, as to such matter, be controlled by mandamus.

APPEAL from Madison Circuit Court.

Heard before Hon. PAUL SPEAKE, Special Judge.

Action by Anna V. T. Christian against John William Buford. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

This was an action of trespass to realty, and contained a number of counts not necessary to be here set out. It is not deemed necessary to set out the pleas that were stricken, as the matters therein set up were permitted to be introduced under the general issue, which was that the defendant was in the quiet possession of the land on which trespass was charged, and was cultivating the same when the plaintiff entered upon said land, ploughed up, trampled down and destroyed the plaintiff's crop and erected a wire fence across said land. The evidence tended to support the plaintiff's contention as to the ownership of the land, and there was evidence tending to support the defendant's contention, that at the time of the alleged trespass he was in possession of the land. It was shown that one Baker became the tenant of plaintiff, but without notice thereof, paid the rent to the defendant. The court, at the request of the plaintiff, gave the following charges: 11. I charge you gentlemen, that as a matter of law, James Baker while in possession of the lands in dispute as tenant of Mrs. Troy or the tenant of Mrs. Christian could not surrender possession of the same to the defendant so as to vest him with such possession as would in law defeat this action, without the consent of the landlord from whom he rented the same. Charge 12. I charge you as a matter of law that even if the defendant had made an agreement with James Baker, at a time when he was the tenant either of Mrs. Troy or of Mrs. Christian, whereby the defendant, Buford was to work certain other land in consideration of which the said Baker was to hold and

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work the lands in dispute until the termination of the four year lease and such agreement was oral and not in writing the same was void, and even had such agreement been made in writing, between the said Baker and the defendant, without the knowledge and consent of the person from whom Baker rented said lands, the same would not constitute a defense to this action or constitute the same. The court refused to give the following charges requested by the defendant. 2. If the jury believe from the evidence that the defendant was in adverse possession of the land described in the complaint, at the time of the alleged commission of the act complained of, they must find for the defendant. 26. If the jury believe from the evidence that the defendant entered into the possession of the real estate described in the complaint some months prior to the alleged trespass and that his possession was adverse to the plaintiff, and that shortly before said alleged trespass, plaintiff entered upon said land by force and destroyed defendant's crops and erected a fence across his possession, then I charge you that plaintiff has not shown such a possession as would entitle her to maintain this suit. There was judgment for plaintiff and her damages were assessed at \$1.00. The plaintiff moved the court to certify under the statute, that the case was in tort, and that the jury should have awarded the plaintiff more than \$20.00 damages, whereupon the court made such certificate as is required by section 1326 of the Code and filed the same with the clerk of the circuit court. The defendant objected to this and upon the submission of this cause, filed an application to this court to require the presiding judge to strike this certificate. This application was denied.

COOPER & FOSTER, PETTY & DRAKE, and HENRY A. BRADSHAW, for appellant.—The court erred in striking defendant's pleas 8 and 9.—*Stewart v. Tucker*, 106 Ala. 322. The court erred in admitting the evidence tending to show that defendant removed the fence after the bringing of the suit and of his having gathered corn also. These were not admissible in aggravation of damages.—*Stein v. Burden*, 24 Ala. 130. The court erred in

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refusing charges Nos. 2 and 26 requested for defendant.—*Cooper v. Watson*, 73 Ala. 252; *Beatty v. Brown*, 76 Ala. 267; *Stewart v. Tucker, supra*; *Garrett v. Sewell*, 108 Ala. 521. There was no question of vindictive or exemplary damages in this action.—*Wilkerson v. Searcy*, 76 Ala. 181; *L. & N. R. R. Co. v. Bizzell*, 131 Ala. 429. This being true defendant's motion should have been granted taxing plaintiff with the cost in excess of one dollar, the amount of the recovery.—Section 1326, Code 1896.

S. S. PLEASANTS and M. H. LANIER, for appellee.—If the court committed error in striking pleas 8 and 9, it was error without injury since defendant got the full benefit of these pleas in the testimony and under the general issue.—*Garrett v. Sewell*, 108 Ala. 521; *American Can Company v. Ryan*, 112 Ala. 347; *Lunsford v. Walker*, 93 Ala. 38; *Rogers v. Brazzeal*, 34 Ala. 514; 36 Ala. 140; 47 Ala. 343; 109 Ala. 307; 111 Ala. 586; 112 Ala. 465. If the court erred in permitting proof of more than one trespass it was error without injury as only nominal damages were awarded.—*Warrior C. & C. Co. v. Mabel Mining Co.*, 112 Ala. 624; *Garrett v. Sewell, supra*. The evidence was admissible on the question of vindictive damages.—*Day v. Woodworth*, 13 How. 363; 1 Sedgwick on Damages, Sections 361, 3 and 4; *Garrett v. Sewell, supra*.

TYSON, C. J.—This is an action of trespass quare clausum fregit. To the complaint the defendant, in addition to the plea of the general issue, filed two special pleas, numbered 8 and 9, which were, on motion, stricken from the file. The matters set up in these pleas were allowed to be shown under the general issue. It thus being made to affirmatively appear that the defendant had the full benefit of the pleas on the trial, the striking of them, if error, was clearly harmless.—*L. & N. R. R. Co. v. Hall*, 131 Ala. 161, 32 South. 603.

Since the plaintiff only recovered nominal damages (\$1), the defendant was not prejudiced by the admission in evidence of his conduct with respect to the land in controversy after the commencement of the action.



[Buford v. Christian.]

"The gist of the action is the injury done to the possession; and, of consequence, to support it the plaintiff must show that, as to the defendant, she had at the time of the alleged injury rightful possession, actual or constructive. Of course, if he has title to the property alleged to have been trespassed upon, he has constructive possession of it, unless he has parted with the possession, conferring on another the exclusive right of enjoyment, against whom he has not the right of immediate possession."—*L. & N. R. R. Co. v. Hall, supra*. The evidence clearly authorized the jury to find that the land upon which the alleged trespass was committed belonged to the plaintiff, and that she had either the actual or constructive possession of it at the time the trespass was committed. The affirmative charge requested by defendant was, therefore, properly refused.

The atornment of Baker, while the tenant of plaintiff, to the defendant, without notice to the plaintiff, did not destroy her possession.—*Fleming v. Moore*, 122 Ala. 399, 26 South. 174. Charges 11 and 12, given at plaintiff's request, as we construe them, assert no more than this principle. If it was perceived that they were calculated to mislead the jury, this could have been corrected by requested instructions.

Charges 2 and 26, requested by defendant, were properly refused. Under the undisputed testimony the land described in the complaint belonged to the plaintiff, and the act of possession, relied upon and asserted in these charges as constituting adverse possession, was, under the testimony, a trespass pure and simple. Indeed, the defendant, in his testimony, shows that he does not, and never did, assert any right, title, or claim to any land in section 12, upon which the trespass in the complaint in this case is alleged to have been committed.

The only remaining point insisted upon is that the presiding judge erroneously certified that plaintiff should have been awarded greater damages than \$20 by the jury. This certificate was authorized by section 1326 of the Code of 1896, which is in this language:

[Buford v. Christian.]

"In all actions to recover damages for torts the plaintiff recovers no more costs than damages, where such damages do not exceed twenty dollars, unless the presiding judge certifies that greater damages should have been awarded; and on failure to certify, judgment must be rendered against the plaintiff for such residue." The action of the presiding judge in refusing to certify, or in certifying, under the statute, is not made revisable under the statute by this court, and, therefore, cannot be reviewed. The exercise of this power or authority committed to him by the statute is similar to that formerly exercised by the judges of the circuit courts in disposing of motions for new trials, which rulings were not revisable by this court until made so by statute.—2 Brick. Dig. 276, § 1. And at this time the disposition of a motion for new trial by the probate court is not revisable; neither is it in criminal cases, nor is the action of a trial court in refusing to set aside a judgment by default.—*Haygood v. Tait*, 126 Ala. 264, 27 South. 842; *Beatty v. Hobson*, 133 Ala. 270, 31 South. 946; *Walker v. State*, 91 Ala. 76, 9 South. 87.

But it is insisted that the action of the judge here complained of will be controlled by mandamus, and to this end a motion is made. We are clearly of the opinion that his act cannot be revised in this way. It can no more be the office of a writ of mandamus to revise the act of the presiding judge in the matter sought to be revised than it would be the function of the writ to review his ruling upon a motion for a new trial, if no appeal was provided by statute. The motion must, therefore, be denied.

No error being shown of prejudice to appellant, the judgment appealed from must be affirmed.

Affirmed.

HARALSON, SIMPSON, and DENSON, JJ., concur.

[Lindsey v. Southern Ry. Co.]

## Lindsey v. Southern Ry. Co.

### *Damages for Flooding Lands.*

(Decided Feb. 14, 1907. 43 So. Rep. 139.)

1. *Waters and Watercourses; Ditches; Flooding Land.*—As the company would be liable for damages from ordinary floods, it is liable for damages caused by the digging of a ditch along its right of way leading and emptying into a creek, through which ditch, in times of high water, the waters from the creek flow, and after passing through openings in defendant's track, overflow plaintiff's lands, although the ditch was not negligently constructed and the damages only occur during high waters.
2. *Same; Action; Pleading.*—It is not necessary for the complaint to aver that the ditch was negligently constructed, in an action for damages for flooding lands caused by the construction of a ditch opening into a creek, and through which, in time of high water, water from the creek flowed and overflowed the lands; nor is such complaint objectionable because it avers that the damages occurs during high waters, because the defendant is liable for ordinary floods, and if unprecedented, this is a defense which need not be negatived by the complaint.

APPEAL from Lawrence Circuit Court.

Heard before Hon. A. H. ALSTON.

Action by Sarah E. Lindsey against the Southern Railway Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

The complaint as originally filed was as follows: "Plaintiff claims of the defendant the sum of one thousand dollars, for that, whereas, during the latter part of the year 1902 she owned the following described real estate, in the county of Lawrence, in the state of Alabama: (Here follows a description of the land.) That during said time the defendant has owned and operated a railroad track and roadbed adjacent to said land. That some time during the year 1900 the defendant cut a ant's power of dominion over its land in a wrongful, careless, or negligent manner. (9) It does not appear

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*Crabtree v. Baker*, 75 Ala. 91; *Jitt v. Hughes*, 67 N. Y. 267; 30 A. & E. Ency. of Law (2nd Ed.) 335-337. The ditch on the south side of its said track, and also on the south side of the aboved described land and along its right of way to a certain creek which runs north and across said railroad track, and that said ditch has been kept open to the time of bringing this suit. Plaintiff alleges that on account of the digging of the said ditch and the maintaining of the same by the defendant the waters from said creek during high water flow west along said ditch and in great torrents, and makes its way through openings under said track and overflows the above-described premises. That the said waters did not overflow the land of the defendant before the digging of the ditch. That during the latter part of the year 1902, and during a part of the year 1903, the waters that were thrown back upon the premises of the plaintiff by maintaining of said ditch washed the soil from portions of the land, caused a deposit of sand upon other portions of it, created a pond of water upon a portion of the land, and destroyed plaintiff's crops that were grown thereon, to plaintiff's damage as aforesaid."

To this complaint the defendant filed the following demurrers: "(1) It does not state a cause of action. (2) It does not appear from said complaint that the opening or construction of said ditch was the proximate cause of the injury set forth in the complaint. (3) That in the digging and constructing said ditch defendant was in the rightful exercise of its power of dominion over its own land, as appears from the complaint. (4) It does not appear that the said ditch was opened or constructed in an unskillful or negligent manner, so that said opening or construction of said ditch itself caused the injury. (5) For that it appears that the injury complained of was caused by high water or flood. (6) For that it does not appear that the injury complained of would not have happened at the particular time if there had been no ditch. (7) It does not appear from said complaint that the defendant exercised its right of dominion over its land in a wrongful, careless, negligent manner. (8) It does not appear that the injury complained of was caused by the exercise of the defend-

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that defendant opened or constructed said ditch with due care and diligence. (10) It does not appear therefrom that said ditch was wrongfully, carelessly, or negligently constructed. (12) It does not appear in said complaint that at the time of the opening of said ditch that plaintiff had any interest in said land. (13) It appears that at the time of the cutting of said ditch defendant was upon its right of way and in the rightful exercise of its right of eminent domain. (14) It does not appear that the defendant was a trespasser, or that its right of way upon which said ditch was cut was not properly condemned, and compensation therefor paid to the owner of the land. (15) It appears that said ditch was cut along the right of way of defendant's said railroad before and prior to the plaintiff's acquiring any interest in said land, and said ditch was opened and in use by defendant for the purpose for which it was cut and opened continuously from the opening of it to the institution of this suit."

These demurrers were sustained, whereupon the plaintiff filed an amended complaint, which is but an elaboration of the first count and in which the gravamen of the charge is the maintaining of the ditch. Similar demurrers were filed to this count and sustained, whereupon the plaintiff amended her complaint in other particulars, and similar demurrers were interposed and sustained to this. There was verdict and judgment for defendant.

KIRK, CARMICHAEL & RATHER, for appellant.—The court erred in sustaining demurrer 1.—*Milligan v. Pollard*, 112 Ala. 455; *Trainham v. Drum, et al.*, 112 Ala. 277; *Everett v. Banking Co.*, 96 Ala. 381. The court also erred in sustaining demurrer 2.—*L. & N. R. R. Co. v. Quick*, 28 South. 16; *Armstrong v. Railway Co.*, 26 South. 49; *Central of Ga. Ry. Co. v. Windham*, 126 Ala. 559. The fact that the ditch was cut on defendant's own land and along its right of way does not relieve it.—*C. of Ga. Ry. Co. v. Windham, supra*; *Hughes v. Anderson*, 68 Ala. 280; *Crommelin v. Cox*, 30 Ala. 318;

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court erred in holding that counts 6 and 7 interposed by way of amendment were not within the *lis pendens* and did not relate back.—*City of Sheffield v. Harris*, 112 Ala. 617; *L. & N. R. R. Co. v. Wood*, 105 Ala. 561; *Winston v. Mitchell*, 93 Ala. 544; *Adams v. Phillips*, 73 Ala. 461; *Dowling v. Blackmon*, 70 Ala. 303.

HUMES & SPEAKE, for appellee.—Neither the original nor the 6th count added by way of amendment stated a cause of action and the court properly gave the affirmative charge as to these counts regardless of whether its allegations were true or of whether the proof made out a case of negligence.—*A. G. S. R. R. Co. v. Shahan*, 116 Ala. 303; *Mayer, etc. v. Ewing*, 116 Ala. 578; *Southern Ry. Co. v. Bunt*, 131 Ala. 591; *Perkins v. Birmingham Southern Ry. Co.*, 132 Ala. 469. Counts 6 and 7 added by way of amendment were not within the *lis pendens* and did not relate back.—*Nelson v. First Natl. Bank*, 139 Ala. 578; *C. & W. Ry. Co. v. Bridges*, 86 Ala. 448; *Arndt v. City of Cullman*, 132 Ala. 530.

HARALSON, J.—The original complaint alleges in substance that the defendant cut and maintained a ditch on and along its right of way leading into a certain creek, that because of same, the waters from the creek in times of high water flow west along the ditch in great torrents and, making its way through openings under defendant's track, overflows plaintiff's lands; that such waters did not overflow the lands before the digging of the ditch, and that the waters so thrown back on plaintiff's land caused the injury complained of to her damage, etc.

The action is in case for damages caused by thus diverting waters from the channel of a running stream. No question is involved of the right to collect and discharge in great volume surface waters which by nature already flow over the lands of the party complaining. This latter question was considered in *Hughes v. Anderson*, 68 Ala. 286, 44 Am. Rep. 147, where the court drew a distinction between the two classes of cases. Touching the issue here involved it was said: "Under

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these rules, defendant had no right, by ditches or otherwise, to cause water to flow on the lands of plaintiffs, which in the absence of such ditches, would have flowed in a different direction." In *Central of Ga. Ry. Co. v. Windham*, 126 Ala. 559, 28 South. 395, it was said: "The gravamen of the complaint lies in averments \* \* \* that the defendant, \* \* \* made excavations, ditches and culverts whereby surface rain water which otherwise would have run in a different direction, was conveyed to and allowed to overflow plaintiff's lands to his damage." Again in *S. A. & M. Ry. v. Buford*, 106 Ala. 312, 17 South. 398: "The wrong intended to be guarded against is the diversion of water, causing it to flow upon the lands of another, without his will, which did not naturally flow there, and it is not deemed material, whether the water is diverted from a running stream, or is surface water caused to flow where it did not flow before." Citing authorities.

It is not necessary in such cases that there be an averment that the excavation, though made by defendant on his own lands, were negligently constructed. The flow of waters is governed by well known natural laws. The comparative levels of the banks of a stream and of neighboring lands are of easy ascertainment. It is not an unjust application of the maxim, "sic utere tuo," etc., to require a party in cutting ditches on his own lands to ascertain at his peril whether he will thereby divert the water from a stream and cause it to overflow the lands of his neighbor. Speaking of averments of negligence, etc., this court declared in *S. A. & M. Ry. v. Buford*, *supra*: "This verbiage may be rejected as surplusage, for it is obvious the gravamen of the complaint is that the roadbed and embankment, at a particular time after their construction, caused the surface water to flow from the right of way of the defendant, in and upon the lands of the plaintiff, where it did not flow naturally, to her injury."

Nor is it objectionable that it is averred the injury occurred during times of high water. It is of common knowledge that frequently at certain seasons of the year,

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and occasionally at all seasons, heavy rainfall occurs in this state, producing high waters or floods in the streams, often filling their channels to the top of the banks, and even overflowing them. At such times the owners of adjacent lands have the right to drainage to the full capacity of the channel of the stream. One who diverts such high water from the stream over the lands of another is answerable for the consequent injury, the same as if diverting it at ordinary stages of water. Only unprecedented floods, such as with the aid of past experience could not have been reasonably anticipated, constitute the act of God, for which man is not answerable. Such act of God is defensive matter and need not be negatived in the complaint.—*Gulf Red Cedar Co. v. Walker*, 132 Ala. 556, 31 South. 374; *Nininger v. Norwood*, 72 Ala. 281, 47 Am. Rep. 412.

Applying the foregoing principles to the rulings of the court below, it follows that there was error in sustaining the demurrers to the original complaint. The same must be said as to the other added counts to which demurrers were sustained.

It seems to be unnecessary to consider other matters assigned as error.

Reversed and remanded.

TYSON, C. J., and SIMPSON and DENSON, JJ., concur.

## **Tutwiler Coal, Coke & Iron Co., v. Wheeler.**

*Action for Damages for Polluting a Stream.*

(Decided Feb. 7th, 1907. 43 So. Rep. 15.)

1. *Waters and Water Courses; Pollution; Action; Pleading.*—The averment in a complaint of plaintiff's ownership of the land and permanent damages to the fee does not render the complaint demurrable in an action for injury to plaintiff caused



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by defendant's throwing refuse matter into the streams, though the injury is against the possession.

2. *Limitation of Action; Pleading; Demurrer.*—Where the complaint fails to show the time of the alleged wrong and damages, if it is desired to show that such damages was barred by limitations, it must be done by plea and cannot be raised by demurrer.
3. *Evidence; Secondary Evidence; Conveyances.*—Ownership of land cannot be proved by parol evidence, and hence a question "How many acres do you own there?" is objectionable.
4. *Appeal; Harmless Error; Admission of Evidence.*—While it was error to allow parol testimony as to plaintiff's ownership of the land, such error is rendered harmless where documentary evidence of plaintiff's title is subsequently introduced by defendant.
5. *Trial; Direction of Verdict; Grounds.*—The defendant pleaded that in consideration of a stated amount paid by him to plaintiff, plaintiff released defendant from the damages for which the suit was brought, and plaintiff took issue thereon. The evidence established the release without conflict, and the defendant was entitled to the general charge.

## APPEAL from Birmingham City Court.

Heard before Hon. C. W. FERGUSON.

Action by Albert J. Wheeler against the Tutwiler Coal, Coke & Iron Company. Judgment for plaintiff, and defendant appeals. Reversed.

The complaint in this case was as follows: "The plaintiff claims of the defendant the sum of \$1,990.00, for that heretofore, to-wit, all the time since the year 1887, the plaintiff has been the owner of the S. W. 1-4 of the N. W. 1-4 and the W. 1-2 of the S. E. 1-4 of section 22, township 16, range 4 west, situated and being in Jefferson county, Alabama. Upon said lands is situated the homestead of the plaintiff, and through said lands there flows a creek or stream of water. Plaintiff avers that since he has become the owner of said land the defendant has opened and is now operating coal mines on or near by said stream of water above his said land, and has for a long while been operating a coal washer on or near said stream above plaintiff's said land. That plaintiff was entitled to have the water in said creek or stream flow by or through his said land in

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a pure condition, and has been entitled to the use of said water in its natural condition and volume. Plaintiff avers that the defendant, in washing coal at its said washer, has caused to be cast or thrown into said creek, above plaintiff's land, large amounts of coal, coal dust, mud, clay, minerals, and other refuse matter, whereby and wherefrom the water of said stream has been corrupted and contaminated and polluted to such an extent that it is unfit for domestic uses and from and on account of which the bed of said stream has become to a large extent filled, so that the water overflows the banks of said stream and spreads on and over plaintiff's premises, and from and on account of which the said mud, minerals, coal, coal dust, and other refuse matter have been deposited upon the land of plaintiff, whereby and wherefrom his lands have become unsuited for agricultural purposes, and have been rendered wholly unsuited for habitation. Plaintiff avers that from and on account of said wrong his lands have been permanently injured and damaged, and rendered wholly unsuited for habitation or for agricultural purposes; that from and on account of said pollution of said stream and the said deposits upon his land there constantly arises, from or about said stream and deposits, noisome and unhealthful odors, and the air thereabout has been rendered impure; that on account of said injuries the health of plaintiff and his family has been greatly impaired; that the plaintiff has on that account been caused to expend large amounts of money and incur large liabilities in and about his attempt to cure and heal himself and members of his family, and his lands have been rendered unsuited for cultivation and for habitation." Demurrers were interposed as follows: "It is not alleged when defendant caused to be cast or thrown into the stream running through plaintiff's land a large amount of coal, coal dust, clay, minerals, and other refuse matter. It is not alleged when the waters of the stream running through plaintiff's land became contaminated and polluted from the deposits placed in said stream by defendant. It is not alleged when the bed of the stream running through plaintiff land became filled up. It is not alleged when plaintiff's land became permanently

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injured and damaged by defendant's acts. There is a misjoinder of causes of action in said complaint, in that plaintiff claims damages for alleged injuries to two distinct and separate parcels of land." These demurrers having been overruled, the defendant filed five pleas: (1) The general issue; (2) the statute of limitations of one year; and (5) that plaintiff heretofore, in consideration of \$200 paid him by the defendant, released defendant from all damages on account of defendant's operating coal mines or carrying on mining or other operation. The tendencies of the evidence are sufficiently set out in the opinion. Plaintiff had judgment for \$375, from which this appeal is prosecuted.

AUGUSTUS BENNERS, for appellant.—It is incumbent on the plaintiff under his complaint to prove the ownership and the testimony of the witness that he owned a particular body of land is incompetent.—*Shipman v. Barter*, 21 Ala. 456; *Brasher v. Shelby Iron Co.*, 40 South. 80; *Bolling v. M. & M. Ry. Co.*, 128 Ala. 550; *Chastang v. Chastang*, 37 South. 799. The court erred in not sustaining the objection to the question, "How many acres do you own there?"—*Withers v. The State*, 120 Ala. 394; *Benson v. Files*, 68 S. W. 494; *Kirkpatrick v. Clarke*, 132 Ill. 342. Charge 16 should have been given for defendant.—*Taylor v. Howard*, 110 Ala. 468. The recovery of damages is limited to that inflicted in the year prior to the time the suit was brought.—*Tutwiler C. C. & I. Co. v. Mitchell*, 39 South. 702.

R. J. WHEELER, and ARTHUR L. BROWN, for appellee.—The objection to the question as to how many acres of land Wheeler owned there was properly overruled since Wheeler's possession was prima facie sufficient to raise evidence of title.—*McCall v. do ex. dem. etc.*, 17 Ala. 533; *Eakin v. Brewer*, 60 Ala. 579; *Eagle & Phoenix Mfg. Co. v. Gibson*, 62 Ala. 369; *Higdon v. Kennemer*, 120 Ala. 193. In any event the reception of this evidence was harmless since the same case was made by legal testimony.—*Horton v. Barlow*, 108 Ala. 417; *Tyson v. Chestnutt*, 118 Ala. 387; *McWhorter v. Fraser*, 129 Ala. 450; *L. & N. R. Co. v. Banks*, 132 Ala. 485.

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It is within the discretion of the court to allow a leading question.—*Anderson's Case*, 104 Ala. 88; *Krebbs v. Brown*, 108 Ala. 508; *McDonald v. The State*, 118 Ala. 672; *Mann v. The State*, 134 Ala. 1.

DOWDELL, J.—The wrong complained of was one against the possession, although it might have extended to a permanent injury of the freehold. The action is well brought for the wrong to the possession, and the averment in the complaint of plaintiff's ownership of the land and of the permanent damage to the fee does not render the complaint for that reason demurrable. It was not necessary to a good cause of action for the plaintiff to allege in his complaint the time of the alleged wrong and damages. If the defendant wished to show that the claim for damages was barred by the statute, this was matter for plea. The demurrer to the complaint was properly overruled.

The plaintiff averred his ownership of the land and undertook to prove it by parol evidence. This he could not do under the well-settled rules of evidence. The question to the plaintiff, "How many acres do you own there?" embraced in the inquiry something more than the number of acres in a particular tract, and extended to proof of title to the land. For this latter purpose this evidence was incompetent. The court erred in overruling the defendant's objection to this question.—*Withers v. State*, 120 Ala. 394, 25 South. 568. But, if this were the only error, the cause would not be reversed, as it was rendered harmless by the defendant subsequently introducing evidence showing that the land in question was the plaintiff's land.

The fifth plea of the defendant, on which the plaintiff took issue, was literally established by the evidence without conflict. This entitled the defendant to the general charge, as requested, and the court erred in its refusal. For this error the judgment must be reversed.

Reversed and remanded.

TYSON, C. J., and ANDERSON and MCCLELLAN, JJ., concur.

[Henry v. Davis.]

**Henry v. Davis.***Trespass to Realty.*

(Decided Feb. 14th, 1907. 43 So. Rep. 122.)

1. *Ejectment; Recovery of Damages.*—Under Section 1555, Code 1896, mesne profits only, and not damages for trespass are recoverable in ejectment.
2. *Trespass; Possession of Plaintiff at Time of Trespass; Evidence.*—The plaintiff introduced no evidence of possession except a judgment in ejectment, and as that relates only to the time of beginning the ejectment suit, and as there was no evidence of trespass except prior to the date of the beginning of the ejectment suit, plaintiff cannot recover for the trespass.

**APPEAL from Mobile Circuit Court.****Heard before Hon. SAMUEL B. BROWNE.****Action by Mary Henry against M. L. Davis. Judgment for defendant. Plaintiff appeals. Affirmed.**

**ERVIN & MCALEER**, for appellant.—The measure of damages is the difference in the value of the land before and after the trees were cut from it and the court erred in sustaining an objection to a question seeking to elicit this information.—*White v. Yawker*, 138 Ala. 275; *Warrior C. & C. Co. v. Mobile Mining Co.*, 112 Ala. 624. The evidence showed that the timber was cut by defendant, the damage to the land by cutting, and that the land belonged to the plaintiff, and that was all that was necessary. The court erred in excluding this evidence.—*Fry v. Banks*, 16 Ala. 285; *Carlisle v. Killebrew*, 89 Ala. 33; *Coperton v. Smith*, 85 Am. Dec. 206; *Ladd v. Dubroca*, 61 Ala. 25.

**GREGORY L. & H. T. SMITH**, for appellee.—It is never permissible to introduce the opinion of an expert upon the very issue to be determined by the jury.—*L. & N. R. Co. v. Landrum*, 135 Ala. 511; 5 A. & E. Ency. of

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Evidence, p. 529. The age of a document or stump is not the subject matter of expert testimony.—*Cheney v. Dunlap*, 29 N. W. 925; *Clarke v. Brooks*, 12 Hun. 271; *Ellenwood v. Bragg*, 52 N. H. 490. The expression of an opinion in regard to the matter can never be regarded as in conflict with the positive testimony of witnesses having knowledge of the facts.—*A. G. S. R. Co. v. Roach*, 16 Ala. 362. The burden was on the plaintiff to show that the stumps were cut subsequent to the institution of the action of ejectment and a statement in the alternative cannot be regarded as a statement of either fact.—*Tinney v. C. of Ga. Ry. Co.*, 129 Ala. 526; *L. & N. R. R. Co. v. Duncan*, 137 Ala. 454; *Southern Ry. Co. v. Bunt*, 131 Ala. 595; *Shelton v. Southern Ry. Co.*, 136 Ala. 191. It is thoroughly settled that while a judgment in an action of ejectment is conclusive of the plaintiff's right to recover damages to the premises by the defendant in ejectment between the date of the demise and the date of the judgment in ejectment and under the statutory action the judgment proved the plaintiff's right from the date of the filing of the complaint in ejectment and not before.—*Shumake v. Nelms*, 25 Ala. 126; *Carlisle v. Killebrew*, 89 Ala. 333; *Kille v. Ege*, 82 Pa. St. 102; *Jackson v. Randall*, 11 Johns. 405; *West v. Hughes*, 1 H. & J. 574; *Ashland v. Parkland*, 11 Burr, 668; *Yount v. Howard*, 14 Cal. 469. A recovery cannot be had in an action for trespass based upon testimony which disclosed that the defendant himself did not participate in the act.—*Southern Ry. Co. v. Yancey*, 141 Ala. 246; *Birmingham Ry. Co. v. Gunn*, 141 Ala. 372.

SIMPSON, J.—This was an action of trespass for cutting trees, brought by the appellant (plaintiff) against the appellee (defendant). The plaintiff introduced the record from the Mobile circuit court, showing that plaintiff had recovered the land on which the cutting was done in a statutory action of ejectment against the defendant on the 14th day of January, 1904, and the damages claimed in this suit are for cutting of trees on said land by the defendant while he was in possession of the same. On motion of the defendant the court first ruled out the testimony of several witnesses for plain-

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tiff, and the record of the ejectment suit, and then, on motion by the defendant, ruled out all of the testimony of the plaintiff, on the ground that it was irrelevant and immaterial, and overruled a motion for a new trial. Appellee claims that the ruling of the court in this particular was correct, because the evidence shows (1) that the trees were cut before the commencement of the ejectment suit; and (2) that the trees were not cut by the defendant himself, but by his employees. Said ejectment suit was commenced on March 17, 1903, and this case was tried on January 14, 1904.

On the first proposition, J. M. Stringfellow, a witness for plaintiff, testified that he had been in the logging and timber business since he was 16 years old, and that he counted something over 900 stumps, from which the timber "had been cut one or two years before" July, 1904. Stewart, a witness for plaintiff, testified that "several years ago he was engaged in sawmill business along where the lines were run around this piece of land, the timber had been cut \* \* \* the stumps were pretty thick." Joe Lee, a witness for plaintiff, testified that about five years ago he worked for defendant, helping to saw timber cut on said land; that Davis was not there; and that witness was employed by one Snow, who was "saw boss" for defendant. Snow testified that defendant had the timber cut off five or six years ago, that defendant was not there himself, and witness was employed by one Willis, who had been employed by defendant. It seems that, under the old fictitious action of ejectment, only nominal damages were allowed, and in order to provide a remedy for actual damages, which had been allowed before the introduction of the fictions, a new application was made of the common-law action of trespass, which was brought after the right of possession in the plaintiff had been established by the action of ejectment. In this action the plaintiff recovers mesne profits, and all damages which had been sustained by him by reason of the disturbance of his possession by the defendant.—Merrelle on Ejectment, pp. 584, 588, 590, §§ 526, 530, 531; *Baron v. Abeel*, 3 Johns. (N. Y.) 481, 3 Am. Dec. 515; *Drexel v. Man*, 2 Pa. 271,

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274-276, 44 Am. Dec. 195; *Shumake v. Nelms' Adm'r*, 25 Ala. 126, 134.

The theory of the law is that, as it has been decided that the defendant was not entitled to the possession, his interruption of the possession of the plaintiff was tortious, and, in contemplation of law, the plaintiff was in possession all the time. That being the case, he has the right to maintain the action of trespass, just as if he had been actually in possession all of the time, and consequently he can recover, not only for rents, or mesne profits, strictly speaking, but for an injury by waste or otherwise, which would be the proper subject of an action of trespass.—*Leland v. Tousey*, 6 Hill (N. Y.) 328, 331, 332; *Dewey v. Osborn*, 4 Cow. (N. Y.) 329, 338. As our own court has said, "after he has recovered in ejectment, the law, by a kind of *jus postliminii*, supposes the freehold all the time to have continued in him."—*Fry v. Branch Bank of Mobile*, 16 Ala. 285. It will be seen that the right to recover for mesne profits, in an action of trespass after recovery of the land in an action of ejectment was based originally on the idea that only nominal damages could be recovered in the action of ejectment. So the question is suggested, what effect does our statute which allows a recovery for damages, in an action of ejectment, have on the right to bring this action thereafter?—Code 1896, § 1555.

Shortly after the passage of the original act allowing a recovery of damages in actions in the nature of ejectment, this court held that, inasmuch as the right to recover for mesne profits was involved in the action of ejectment, there could be no subsequent action for their recovery, whether they were actually recovered in the action of ejectment or not.—*Cummings v. McGhee*, 9 Port. 349, 351. So it would seem that, if the damages here sought to be recovered were recoverable in the action of ejectment, they could not be recovered in the subsequent action. This court, in the case of *Kellar v. Bullington*, 101 Ala. 270, 14 South. 467, made a remark to the effect that, in the action of ejectment, "all damages, not only for mesne profits, but for injuries committed in the nature of trespass or waste," were recoverable; but subsequently, when the question came to be



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directly considered by this court, it was held that by virtue of this statute the only damages recoverable in an action of ejectment are "what are known as mesne profits—compensation for use and occupation."—*Prestwood v. Watson*, 111 Aal 604, 610, 20 South. 600. It results, then, that these damages are not recoverable in the action of ejectment. The common-law remedy still remains.—Sedgwick & Wait's Trial of Title to Lands, § 668.

But there seems to be no controversy between the parties as to the above principles. The first point of contention is as to the probative force of the record of the judgment in ejectment. The appellant seems to hold that the effect is to show possession in the plaintiff as far back as he actually held possession, while the appellee contends that it shows possession only as to the time when the suit was instituted, and that consequently the plaintiff could not recover for any trespass committed before that time. On this theory he contends that the evidence conclusively shows that whatever acts of trespass were committed were before that time, and consequently the court was right in excluding all of the testimony of plaintiff. The authorities are clear that, under the old system of pleading, the record of the recovery in ejectment was conclusive proof of the right of possession by the plaintiff at the time of the demise laid, and that, if he desired to recover for any trespass previous to that date, he was required to prove his possession, or right to possession, at the time when the alleged trespass was committed. As we have no demise laid in our statutory action of ejectment, it necessarily follows that the only time to which the judgment can relate is the date of the commencement of the suit; and so the authorities hold.—*Baily v. Fairplay*, 6 Bin. (Pa.) 450, 454, 455, 6 Am. Dec. 486; *Kille v. Ege*, 79 Pa. 15; *Man v. Drexel*, 2 Pa. 202, 203; *Drexel v. Man*, 2 Pa. 271, 44 Am. Dec. 195; *Chirac v. Reinicker*, 11 Wheat, (U. S.) 280, 296, 6 L. Ed. 474; *Doe ex dem. Marshall v. Dupey*, 4 J. J. March. (Ky.) 388; *Yount v. Howell*, 14 Cal. 465, 468; *Brewer v. Beckwith*, 35 Miss. 467; Sedgwick & Wait on Trial of Title, § 671; 5 Ency. of Evidence, p. 41. As no evidence of possession was

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offered, except the record of the judgment in ejectment, no evidence could be received of any trespass committed previous to the bringing of the ejectment suit.

It is important, then, to determine when the timber was cut from the land. The witness Stringfellow, for plaintiff, testifies that he counted stumps on the land shortly after July, 1904, and that they appeared to have been cut one or two years, that he had been in the logging business since he was 16 years old, and that he could tell by examination approximately how much timber the trees would produce; but he does not say any thing about being able to tell how long since the timber was cut by looking at the stumps. Stewart testified that several years ago he was in the sawmill business near there, and the timber had been cut then. Joe Lee testified that he had worked two days for appellee, helping to saw timber from the land, above five years ago. Wash Snow testified that appellee had the timber cut off the land about five or six years ago. R. E. Terry testified that it had been about ten years since he cut any timber off the land. The burden was on the plaintiff to prove that timber was cut on the land by defendant on or about the 17th day of March, 1903, the day when the ejectment suit was commenced. As this case was tried on the 6th day of July, 1906, it will be seen that, according to either of the witnesses who fixes any date when timber was cut on the land, the nearest date is five years ago, or in 1901, two years before the bringing of the ejectment suit. Even if we were to give the statement of the witness Stringfellow the force of positive testimony, it would only be that, according to his estimate, the timber was cut either just about the time of the commencement of the ejectment suit, or a year before that time, which would fall far short of making out the plaintiff's case. This testimony, at any rate, should not be given any force, because (1) the witness does not even say that he could tell anything about how long it had been since the timber was cut by looking at the stumps, and there was no evidence that any one could do that; (2) he does not attempt to say who cut the timber. The plaintiff not having made out a *prima facie*

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case, the court committed no error in ruling out the evidence of the plaintiff, nor in overruling the motion for a new trial.

The judgment of the court is affirmed.

TYSON, C. J., and HARALSON and DENSON, JJ., concur.

## Clark v. Jernigan.

*Trover.*

(Decided Dec. 20th, 1906. 42 So. Rep. 833.)

1. *Bills of Exception; Time of Signing.*—Where a bill of exceptions is not signed during the term at which the judgment is rendered, and no order is entered during the term extending the time for signing, it will be stricken on motion.
2. *Costs; Taration in Actions of Tort; County Court; Statutory Provision.*—Under the act creating the county court of Coffee County (Loc. Acts, 1903, p. 399), the said court has jurisdiction concurrent with justices of the peace, and with the circuit court up to the sum of five hundred dollars, and its jurisdiction, in an action of tort for damages in the sum of thirty-five dollars, is that of a justice of the peace, and not of the circuit court, and Section 1326 of the Code of 1896 has no application to the taxing of the costs.

APPEAL from Coffee County Court.

Heard before Hon. B. DIXON ARMSTRONG, Special Judge.

Action by D. W. Clark against Joe Jernigan. From a judgment for plaintiff, defendant appeals. Affirmed.

This was an action for conversion of certain personal property, and the complaint asked for the sum of \$35. The recovery was for \$8, and all the costs of the proceedings were taxed against the defendant, although the costs exceeded the amount of damages in the judgment rendered. The defendant excepted to the taxing of all

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the costs against him, but insisted that only so much costs as equaled the damages assessed should be taxed, and that the other costs should be taxed, if at all, against the successful party; the judge presiding failing to certify that the damages awarded should have been greater. The other assignments of error relate to matters properly shown by bill of exceptions, and the bill of exceptions was stricken because not signed within the time allowed.

SIMMONS & CARNLEY, for appellant.—Attorney's fees are not an element of damage in trover and are not recoverable in any event unless specially claimed.—*Ross v. Malone*, 97 Ala. 530; *Burkes v. Hubbard*, 69 Ala. 379; *Boutwell v. Parker*, 124 Ala. 341; *Birmingham Co. v. Tennessee Co.*, 127 Ala. 144. Charge 1 should have been given.—*Berhman v. Newton*, 103 Ala. 525. The court erred in taxing the cost in excess of the judgment against the defendant.—§ 1326, Code 1896; 21 Ala. 579; 67 Ala. 246; 103 Ala. 197; 132 Ala. 596; 2nd Stewart, 469.

RILEY & WILKERSON, for appellee.—Counsel discuss questions decided but cite no authority.

TYSON, J.—The motion to strike the paper in the transcript purporting to be a bill of exceptions must be granted, for the reason that it is made to appear by its recitals that it was not signed at the term of the court at which the judgment was rendered, and no order entered during the term extending the time for its signing is shown by the record.

The act establishing the court by which this cause was tried confers upon it concurrent jurisdiction with justices of the peace and the circuit court of the county in certain civil causes when the sum in controversy does not exceed \$500.—Loc. Acts 1903, p. 399. This action is trover for the recovery of \$35 as damages for the conversion of certain personal property. It is in the exercise of the jurisdiction conferred concurrent with justices of the peace, and not of the circuit court, that the

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court has authority to try the case.—Sections 918 and 2662 of the Code of 1896. This being true, it is clear that section 1326 of the Code of 1896 has no application. Affirmed.

HARALSON, SIMPSON, and DENSON, JJ., concur.

## Eagle Iron Co., v. Malone.

*Trover.*

(Decided Dec. 19, 1906. 42 So. Rep. 734.)

1. *Pleading; Pleas in Abatement; Time for filing.*—After plaintiff had amended his complaint by striking out the individual defendant as a party defendant, the non-resident corporation defendant should have been allowed to file its plea in abatement, setting up the want of jurisdiction of the court to hear and determine the cause.
2. *Appeal; Review; Scope.*—The cause not being triable on its merits until the plea of want of jurisdiction is disposed of, the other assignments will not be considered.

APPEAL from Marshall Circuit Court.

Heard before Hon. W. W. HARALSON.

Action by James Malone against the Eagle Iron Company and another. From a judgment for plaintiff, defendant company appeals. Reversed and remanded.

The plaintiff (appellee here) sued the defendant appellant and one Stewart in the circuit court of Marshall county, and at the trial discontinued as to Stewart, whereupon the defendant the Eagle Iron Company offered to interpose a plea in abatement, setting out that they had no office, agent, or place of business in Marshall county, and that the court was without jurisdiction to entertain the cause further. The court refused to allow the defendant the Eagle Iron Company to interpose this plea, stating that it came too late. The defendant Stewart was a resident citizen of Marshall county.

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JOHN A. LUSK, for appellant.—Counsel discuss the assignments of error not touched upon in the opinion. Also discusses the right of appellant to file his plea to the jurisdiction of the court, but cites no authority on this proposition.

STREET & ISBELL, for appellee.—Counsel discuss assignments of error touched on in the opinion but cite no authority.

TYSON, J.—After the complaint was amended by striking out the name of Stewart as a party defendant, the remaining defendant should have been allowed to file the plea in abatement proposed by it.—*Eagle Iron Co. v. Baugh*, 147 Ala. 613, 41 South. 663. There can, of course, be no trial of the cause on its merits until this plea, when filed, is disposed of. We will, therefore, not consider any other assignment of error.

Reversed and remanded.

HARALSON, SIMPSON, and DENSON, JJ., concur.

## Wilson & Son v. Curry.

### *Trespass and Trover.*

(Decided Jan. 14th, 1907. 42 So. Rep. 753.)

1. *Chattel Mortgage; Right of Mortgagee before Maturity; Trover and Trespass.*—A chattel mortgagee cannot maintain an action for conversion or for trespass against the mortgage property, by a third person, before maturity of the mortgage where he has no right of possession to the property before default in the mortgage.
2. *Same.*—The equity of a chattel mortgagor being subject to execution or attachment, and the officer having an exclusive right of possession and the right to remove the property from the debtor's premises, the plaintiff in execution or attachment cannot be made liable for trespass or trover in taking the property under either process.

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3. *Trover and Conversion; Detention of Property; Necessity for Demand.*—In the absence of a demand for the delivery of the property, the officer's retention of its possession was not a conversion, where the property taken by the officer under execution was released, and the mortgagor notified thereof.
4. *Landlord and Tenant; Lien for Rent; Superiority over Chattel Mortgage.*—The lien for rent of the landlord and his assignee on a crop raised in the current year, is superior to that of a mortgagee under Sections 2703-06, Code 1896, and the landlord and his assignee are not restricted to any particular portion of the crop for the enforcement of their lien.

APPEAL from Talladega City Court.

Heard before Hon. G. K. MILLER.

Action by Joe Curry against J. C. Wilson & Son. From a judgment for plaintiff, defendants appeal. Reversed and rendered.

This was an action, joining trover, trespass, and case, for the conversion of certain crops, for the taking of the same, and for the destruction of a mortgage lien. Numerous pleas were filed, and demurrers interposed, but it is unnecessary to set them out at length. Harrison Goodson gave Joe Curry two mortgages upon his crop and a mule, one due November 1, 1904, and the other due November 15, 1904, and upon this title Curry bases his claim to maintain the action in its three aspects. The suit was filed November 19, 1904, and service perfected on November 28, 1904. It appears that J. C. Wilson and J. H. Wilson recovered a waive judgment in the Talladega circuit court against Harrison Goodson for the sum of \$294.98, on July 27, 1903, and had the same duly recorded in the office of the judge of probate of Talladega county, and on September 29, 1904, procured execution to issue thereon, and on the 5th day of October, 1904, this execution was levied upon certain property the crops and mule mentioned in the complaint. It also appeared that Harrison Goodson rented the land upon which these crops were grown from one Green Dye for the year 1904, and gave Dye a rent note for 400 pounds of lint cotton. This note was transferred by Dye to Vane, and by Vane to the appellants

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here. The property, when levied on under the execution, was in the possession of Harrison Goodson, and was taken by the deputy sheriff to the warehouse of appellants, after the seed cotton had been ginned. The seed were left at the gin. The cotton seed and the mule, together with a few bundles of fodder, were released from the levy, and were never disposed of by the officer or these appellants. The rent note was enforced by attachment levied November 1, 1904, on certain cotton in the seed.

WHITSON & DYER, for appellant.—The property was in the rightful possession of Harrison Goodson, the defendant in execution and was subject to levy and sale. The test of the liability is whether or not an attempt is made at the sale to sell the entire interest in the property—the interest of the complaining one as well as that of the defendant in execution.—*Hopkinson v. Shelton*, 37 Ala. 310; *Bolling v. Kirby*, 90 Ala. 222. The equity of redemption was capable of being levied upon and sold.—*Bingham v. Vandergrift*, 93 Ala. 283. The lien for rent extended to the entire crop and neither the tenant or his mortgagee had any right to claim that it be restricted to any part of the crop.—*Givens v. Easley*, 17 Ala. 285; *Couch v. Davidson*, 109 Ala. 313; *Andrews Mfg. Co. v. Porter*, 112 Ala. 385.

KNOX, DIXON & BURR, for appellee.—Justification under legal process must be made by special plea.—*Harrison v. Davis*, 2 Stewart, p. 350; *Daniel v. Hardwick*, 88 Ala. 557; *Fields v. Bryce*, 108 Ala. 32. Where the law day of a mortgage is passed without the mortgage debt being paid the mortgagee is entitled to immediate possession of the property conveyed and may maintain an action of trespass for the levy of execution against the mortgagor upon said property.—*Jordan v. Wells*, 104 Ala. 384; *Campbell v. Anderson*, 107 Ala. 656; 80 Ala. 427; 78 Ala. 180; 5 Am. St. Rep. 751; 61 Am. Dec. 480.

TYSON, J.—The plaintiff predicates his right of recovery in this case upon two certain mortgages, executed by one Harrison Goodson, conveying a mule and the



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crops raised by Goodson during the year 1904. One of the mortgages was executed on February 29, 1904, to secure a debt which matured the 1st day of November, 1904. The other was executed on the 29th day of October, 1904, and secured a debt that matured on the 5th of November following. Under the mortgages the plaintiff's right of possession to the property conveyed was postponed until the maturity of the respective debts secured. It appears undisputedly from the testimony that the execution, under which the appellee acquired possession from Goodson of a portion of the property, was levied on the 5th day of October, 1904, and that the attachment writ under which he acquired the possession of the balance of the property from Goodson was levied on the 1st day of November, 1904. If it be conceded that the taking of the property was wrongful, and, therefore, constituted a trespass or conversion, the plaintiff, having no right to its possession at that time, cannot recover under the counts of his complaint in trespass and trover.—*Johnson v. Wilson*, 137 Ala. 468, 34 South. 392, 97 Am. St. Rep. 52; *Heflin v. Slay*, 78 Ala. 180.

But, aside and independent of this consideration, under the testimony upon which the trial was had, no recovery could be had under either of these counts. The property levied on under the execution was in the possession of the mortgagor. He had an equity of redemption in it that was subject to levy and sale under the execution.—Section 189, Code 1896. The officer, executing the process of execution, therefore, had the right to the exclusive possession of the property and to remove it from the premises of the debtor.—*Andrews v. Keeth*, 34 Ala. 722; 11 Ency. of Law (2d Ed.) p. 658. His act of taking and removal, being lawful, could not be tortious, and, therefore, could not be made the predicate for a recovery in trespass and trover. For like reason, his act in executing the process of attachment was not wrongful. And clearly, if the officer levying these processes would not be liable in trespass or trover, these defendants would not be.

Are the defendants liable under the counts of the complaint in case? It is alleged in each of them that

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the property was converted by defendants to their own use, and on account of this conversion plaintiff has lost his lien. It was shown that all the property that was taken by the officer, not condemned in the attachment proceeding for rent of the land, was released from the levy of the execution, and the defendant in execution notified of it. In other words, no sale was made under the execution. But it may be said that it was the duty of the officer, upon the release of the levy, to have restored the property to the defendant in execution. This may be conceded, and yet it is not perceivable how his failure to do so was such a conversion as to destroy the plaintiff's lien, or for that matter, a conversion at all, in the absence of a refusal to deliver to plaintiff upon demand. The possession having been acquired lawfully, in order to make his detention wrongful there must be a demand.—*Boutwell v. Parker*, 124 Ala. 341, 27 South. 309. Furthermore, a mere nonfeasance or neglect of legal duty is not a conversion.—*Bolling v. Kirby*, 90 Ala. 215, 7 South. 914, 24 Am. St. Rep. 789. It was shown that upon the release of the levy the property was offered to the defendant in execution from whose possession it was taken, and that he refused to accept it. In its then status there was no greater obstacle in the way of plaintiff enforcing his lien under his mortgage than there would have been had the defendant in execution accepted it, or had the property never been levied on at all. As to the property condemned and sold in the attachment proceeding for the rent of the land upon which the crops were raised, we need only to call attention to the fact that plaintiff's lien upon this property was subordinate to the one enforced by that proceeding.—Sections 2703, 2706, Code 1896. Nor was the attaching landlord restricted in the enforcement of his lien to any particular portion of the crop.—*Givens v. Easley*, 17 Ala. 385; *Couch v. Davidson*, 109 Ala. 313, 19 South. 507; *Andrews Mfg. Co. v. Porter*, 112 Ala. 381, 20 South. 475. It is entirely clear to us, under the evidence admitted by the court, the case being tried without a jury, that a judgment should have been rendered for defendants.

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We have not noticed the rulings of the court in sustaining demurrers to defendant's special pleas, since, after eliminating the pleas, all testimony admissible under them was admitted in evidence. Proceeding to render the judgment which the trial court should have rendered, one will be here entered for defendants.—Acts 1894-95, p. 1225.

Reversed and rendered.

DOWDELL, ANDERSON, and McCLELLAN, JJ., concur.

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### *Trover and Trespass.*

(Decided Feb. 14th, 1907. 43 So. Rep. 144.)

1. *Agriculture; Liens; Contract of Hire; Crops.*—Where one party furnishes the land and teams and the other party the labor with an agreement to divide the crops between them a contract of hire exists under Section 2712, Code 1896, and the title of the crops are in the owner of the soil, while the laborer has his lien for his share of the crops.
2. *Trover and Conversion; Right of Action; Title of Plaintiff; Assignment of Lien.*—The assignee of the lien of the party furnishing the labor acquires no title that will support trover or conversion for part of the crop.
3. *Same; Evidence; Admissibility.*—Testimony tending to show that the owner of the crop said he would see the debt of the laborer paid was admissible as a circumstance tending to corroborate the assignee of the laborer's lien that the owner did afterwards deliver and turn over the laborer's cotton to him in payment of the laborer's debt.
4. *Same; Right of Action; Title of Plaintiff.*—Where the owner of the crop and the laborer divided the crop in accordance with the terms of the contract, and the part assigned to the laborer was delivered to the assignee of the laborer's lien in payment of the mortgage to them such assignee were entitled to maintain trover for taking the crop by a third person.
5. *Same; Evidence; Admissibility.*—Testimony that the owner of

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the crop told the assignee of the laborer's lien to go and get the cotton for the payemnt of their claims against the laborer was admissible as tending to show that the owner had relinquished his right to the cotton and turned it over to such assignees, or to the laborer.

6. *Same*.—It was competent to show by plaintiff that after the cotton had been taken from plaintiff and placed in defendant's warehouse that the owner of the crop said to plaintiff that plaintiff's bales of cotton were in the warehouse, as a circumstance tending to show that he considered that the cotton had been delivered to plaintiff under the mortgage.
7. *Appeal; Proceeding in Lower Court; Scope of Issues on New Trial; Theory of Action*.—The fact that a case was tried upon a different theory on a former hearing, did not deprive plaintiff of the right to prove anything material to the controversy on the present trial, where the property sought to be recovered was in possession of the defendant at the time of the institution of the suit, and was afterwards sold by his employe.
8. *Trover and Conversion; Title of Plaintiff*.—Where the cotton was raised under a crop contract by one furnishing the lands and teams and the other the labor, and such cotton was delivered by both parties to the contract to plaintiff for credit upon the account of the laborer, the plaintiff is entitled to maintain trover for the conversion of such cotton; and a delivery is shown when the evidence discloses that the owner and the laborer each directed one of the plaintiffs to get the cotton and apply it to the laborer's account.
9. *Same; Instructions*.—A charge is correct which asserts that, in determining whether the cotton was delivered to plaintiffs' the jury must look to all the evidence, and if they are reasonably convinced that the owner directed one of the plaintiffs to get the cotton, then the title to same passed to plaintiffs.
10. *Same*.—A charge asserting that when the cotton was ginned it belonged solely to the owner of the crop, and that before plaintiffs can recover they must prove that they bought it from the owner, and the burden of proving this with reasonable certainty is on the plaintiffs, is incorrect and properly refused.

APPEAL from Marshall Circuit Court.

Heard before Hon. W. W. HARALSON.

Action by Wooley & Jordan against T. L. Farrow. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

The subject of the controversy, together with all the facts necessary to an understanding of the opinion, suf-

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ficiently appear from the opinion. A number of charges were asked and refused to the defendant, but the only one necessary to be here set out is charge 6, and is as follows: "The court charges the jury that at the time this cotton was ginned it belonged solely to John P. Tillman, and before the plaintiffs can recover they must prove that they bought this cotton from Tillman, and the burden of proving this with reasonable certainty is upon the plaintiff."

The following charges were given at the request of the plaintiff: "(A) The court charges the jury that the fact that this case was tried heretofore on a different claim of title cannot be looked to by the jury for the purpose of discrediting the claim of title set up by plaintiffs in this trial. Plaintiffs may set up different claims to the cotton involved in this suit. (B) The court charges the jury that if they find from the evidence that the four bales of cotton after being ginned had been divided, Tillman taking two and Pratt the other two, and said division had been made before Jordan got the bales in controversy, and the bales obtained by Jordan were the bales set apart to Pratt, then the title to said Pratt bales was in Pratt, and his delivery of them to Jordan for the account of Wooley & Jordan against him vested the legal title to said cotton in Wooley & Jordan. (C) The court charges the jury that if the cotton in controversy was delivered by Pratt and Tillman to Jordan, for credit on an account of Wooley & Jordan against Pratt, or Pratt and Tillman, then they must find for the plaintiff; and such delivery need not have been made by Pratt and Tillman. It is sufficient if they directed Jordan to get said cotton and apply it on said account. (D) The court charges the jury that in determining whether or not the two bales of cotton in controversy were delivered to Wooley & Jordan, or to Jordan for Wooley & Jordan, by said Tillman, they must look at all the evidence in the case; and if, from all the evidence in the case, they are reasonably convinced that Tillman directed Jordan to get the two bales of cotton, then the title to said cotton passed to Wooley & Jordan."

There was judgment for plaintiff, and defendant appeals.

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STREET & ISBELL, for appellants.—Confessedly, the cotton sued for at one time belonged to one Tillman under whom defendant held.—*Jordan v. Lindsay*, 132 Ala. 567; *Farrow v. Wooley*, 138 Ala. 267. It is clear that whatever right plaintiff acquired by the agreement was not sufficient to pass to them the entire legal interest.—*Foley v. Felrath*, 98 Ala. 180. Under the familiar doctrine of recaption Tillman had a right to retake the property and place it for safekeeping until the respective rights could be adjusted.—*Thomas v. Adams*, 2 Port. 188; *Motes v. Bates*, 74 Ala. 374; *Street v. St. Clair*, 71 Ala. 110. Counsel discuss other assignments of error but cite no authority.

E. O. McCORD, for appellee.—No brief came to the reporter.

SIMPSON, J.—This was an action by the appellee against the appellant; one count being in trover and the other trespass for taking two bales of cotton. The facts are that one Tillman furnished the land and team, and Pratt furnished the labor, to make a crop, and they were to divide the crop in equal proportions. This, according to our statute, was a contract of hire, under which the crop belonged to Tillman and Pratt had a lien on it “for the value of the portion of the crop to which he was entitled.”—Code 1896, § 2712. The plaintiffs made advances to said Pratt during the year 1898, and he executed to them an instrument intended to be a mortgage on his interest in said crop. Under section 2712 of the Code of 1896 the contract of hire existed between the parties. What was the effect, then, of the mortgage made by Pratt. Said section provides that “such lien shall have the same force and effect, and shall be enforced, in the same manner, and under the same conditions, and in the same cases as the lien, in favor of a landlord.”

Under the landlord’s lien statute, as it originally stood, this court held that, as the landlord merely had a lien on the crop of his tenant, which was not the subject of assignment or transfer to another, he did not have any title or interest in the crop which could be the

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subject of a valid mortgage (*Broughton v. Powell*, 52 Ala. 123); also that the statutory right of enforcement by attachment could not be available to an assignee of the landlord (*Foster v. Westmoreland*, 52 Ala. 223). Subsequently the statute was amended so as to permit the assignment of the landlord's lien, clothing the assignee with all of the landlord's rights.—Code 1896, § 2706. Under this statute it results that when a landlord attempts to make a mortgage on the crop of his tenant, while it cannot operate as transfer of the legal title, which he has not, it does operate as an assignment of his lien, and clothes the assignee with the same rights and remedies as the landlord had.—*Leslie v. Hinson*, 83 Ala. 267, 3 South. 443; *Ballard v. Mayfield*, 107 Ala. 396, 18 South. 29. The statute does not transform the equitable lien of the landlord into a legal title, and the fact that he can maintain a claim suit on it is only by virtue of the statute, which has been amended so as to allow the holder of an equitable title "or lien" to maintain that particular form of action.—Code 1896, § 4141. Accordingly this court has held that the statutory lien of the hireling will not support the action of trover.—*Jordan v. Lindsay*, 132 Ala. 567, 31 South. 484. The mortgage could not amount to anything more than an assignment of the lien held by Pratt. Consequently the plaintiff could not maintain the action of trover or trespass on any title acquired by the mortgage, although, as will be shown hereafter, a different question would arise if the crop had been divided and the cotton delivered to him in payment of his lien.

The testimony that Tillman said he would see the debt paid was admissible as a circumstance tending to corroborate the testimony of the plaintiff that Tillman did afterwards turn the cotton over to them for the payment of the debt. One of the plaintiffs further testified that after the cotton was ginned, and while it was at the gin, said Pratt told them to go and get the cotton and apply it to their mortgage. This testimony was objected to by the defendant, and, without more, would be incompetent, as Pratt did not have the title to the cotton and could not authorize the defendant to take it unless he had acquired it from Tillman. But the plaintiff

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proceeded to testify (and he is corroborated by other witnesses) that about the same time Tillman told him that "there were four bales at the gin, two of which were marked 'J. T.' and two marked 'N. P.,' and told Jordan to go and get the two bales marked 'N. P.' and pay themselves out of them what Pratt was owing them." This testimony was contradicted; but, if true, it might authorize the jury to believe that the cotton had been divided, and the two bales marked "N. P." assigned to Pratt, and if both Pratt and Tillman united in authorizing Jordan, for his firm, to take possession of the cotton and pay their debt out of it, that was a delivery to the plaintiffs, either as bailees or as vendees, for the purpose of selling the cotton and out of the proceeds to pay their own debt and account for the overplus to Pratt. Jordan went and got the two bales marked "N. P." and placed them in the rear of his store in Gunter'sville. Subsequently Tillman took the bales, over the protest of plaintiffs, and placed them in the warehouse of defendant. Plaintiffs notified defendant that they had a mortgage on the cotton, and said cotton was in defendant's hands at the time of the commencement of this suit. Tillman claims that he has a lien on Pratt's part of the cotton for advances to the amount of \$56, also denies that the cotton had ever been divided and so marked with his consent, and denies that he authorized plaintiffs to get the cotton.

There are conflicts in the testimony for the determination of the controversy by the jury. It matters not whether the transaction by which the cotton was delivered to the plaintiffs created a bailment, or amounted to a sale, although the former seems to be the case.—*Sattler v. Hallock*, 160 N. Y. 291, 54 N. E. 667, 46 L. R. A. 679, 73 Am. St. Rep. 686. In either case the plaintiffs would be authorized to maintain an action for the taking or conversion of the property. Unquestionably Tillman and Pratt together had a right to dispose of that property in any manner that they might choose, and if it was divided and the two bales turned over to Pratt, and by the concurring act of both delivered to the plaintiffs, to be by them sold and appropriated to the payment of their debt, it had passed beyond the control



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of both Tillman and Pratt. Tillman might have refused to pay it over until the amount due him for advances was paid; but, having paid it over, the law gave him no lien for advances. Pratt simply had the right to demand that the cotton be fairly sold, and, if there was any overplus, to have it paid to him. If, on the other hand, there was no division of the cotton, no payment to Pratt of his part, and no delivery by Tillman and Pratt to the plaintiffs for the payment of their claim, then the cotton remained the property of Tillman, and the plaintiffs could not recover. It is true that if the plaintiffs were the bailees, and used the property in any way contrary to the terms of the bailment, the bailor would have a right to recover his property; but, if the property was divided, Pratt was the bailor, and not Tillman. However that may be, if it was delivered to them, to be sold and applied to the debt of Pratt, they had a right to keep it on their premises for a reasonable time until the sale could be effected, and they committed no wrong in declaring that Tillman had no interest in it.

From what has been said it will appear: (1) That the court did not err in allowing the witness to testify that Tillman said he would see Pratt's debt paid. (2) There was no error in allowing proof that Tillman told Jordan to go and get the cotton, as that was proper, as tending to show that Tillman had relinquished his right and turned the cotton over to Pratt. (3) Nor was there error in permitting Jordan to testify that, after the cotton had been taken from plaintiffs and placed in defendant's warehouse, Tillman said to him, "Your two bales of cotton are in the warehouse," as that was a circumstance going to show that Tillman considered that the property had been turned over to Jordan, as he claims. (4) There was no error in the giving of charge A, on request of the plaintiffs. The fact that the case was previously tried on a different theory could not deprive the plaintiffs of the right to prove anything material to their controversy in this case. No principle of estoppel is shown, as the evidence shows the cotton was in the possession of the defendant at the time of the institution of this suit, and has since been sold by his employe.

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(5) From what has been said, it will be seen that there was no error in the giving of charge B at the request of the plaintiffs. (6) Charge C is not subject to the criticism insisted upon by the appellant. (7) Charge D was properly given. (8) As there was a conflict in the evidence, there was no error in the refusal to give the general charge in favor of defendant.

The only other charge referred to in the brief of appellant is charge 6, requested by the defendant and refused. There was no error in the refusal to give this charge. Although the cotton did belong to Tillman at the time it was ginned, yet it does not follow that the only way in which plaintiffs could have acquired the cotton, or such an interest in it as to entitle them to recover, was by a purchase from Tillman. Tillman may have divided the cotton and paid these two bales over to Pratt, and Pratt may have turned it over to the plaintiffs, with Tillman expressing his consent, by way of giving assurance that he had relinquished all right to it ;and, if these be the facts, the plaintiffs could recover.

The motion for a new trial was properly overruled. There is no error in the record, and the judgment of the circuit court will be affirmed.

**Affirmed.**

TYSON, C. J., and HARALSON and DENSON, JJ., concur.

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### *Trover and Trespass.*

(Decided Dec. 18, 1906.—4t So. Rep. 858.)

1. *Logs and Logging; Sale of Standing Timber; Right to Remove.*—Where the owner of land executes a conveyance to all the timber of a certain size, the legal title to the timber is in the grantee, and he may remove it after the time limit fixed in

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the conveyance, in this case two years, but for so doing, he is liable to the grantor in an action for trespass quare clausum for such actual damages as is sustained to the possession.

2. *Life Estate; Action by Life Tenant.*—While a life tenant may maintain trespass quare clausum for damages to his possession, he cannot maintain trover for the conversion of trees growing on the land, nor trespass de bonis asportavis for the taking of them.
3. *Trespass; Damages; Nominal Damages.*—The grantee in a conveyance owning the standing timber on the land, who removed the timber after the expiration of the time limit fixed by the conveyance for such removal, but in removing the timber did no appreciable damage to the soil or to the possession, is not liable for more than nominal damages in trespass quare clausum.

APPEAL from Clarke Circuit Court.

Heard before Hon. S. H. SPROTT.

Action by William W. Daffin against the C. W. Zimmerman Manufacturing Company. From a judgment in favor of plaintiff, defendant appeals. Reversed and remanded.

The following charges were refused to defendant:

Charge 1: "The court charges the jury that under the deed introduced in evidence the title to the timber has never reverted to the plaintiff."

Charge 5: "The court charges the jury that, if they believe the evidence, they must find for the defendant as to count 1."

Charge 6: "The court charges the jury that under the evidence the plaintiff can only recover for the injury to the land and to the timber under 12 inches in diameter."

WILSON & ALDRIDGE, STEPHENS & LYON, R. W. STOUTZ, and GREGORY L. & H. T. SMITH, for appellant.—The only interest which a life tenant has in the timber growing upon the land is such as is useful and necessary to the proper enjoyment of the life estate in the land.—*Garnett v. Woods*, 140 Ala. 457; *Alexander v. Fisher*, 7 Ala. 154. The remaindermen may bring trespass de bonis but the life tenant has only his action quare clausum.—*Lane v. Thompson*, 43 N. H. 320; *Wood v.*

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*Griffin*, 46 N. H. 230; 18 Ency. of Law, (2nd Ed.) 450 and 453; 15 Ency. of P. & P. 519-20; Washburn on Real Property, § 303. If the entry was wrongful the law conclusively presumes that nominal damages resulted.—*Adams v. Robinson*, 65 Ala. 591; *Parker v. Mise*, 27 Ala. 483; *Trustees, etc. v. Turner*, 71 Ala. 433; *Trammel v. Chambers Co.*, 93 Ala. 389. Unless some distinction can be drawn a conveyance of standing timber which expressly limits the time within which it is to be removed and a similar conveyance in which this time is limited by implication to a reasonable time the construction of the conveyance in the present case it settled in Alabama.—*Heflin v. Bingham*, 56 Ala. 566; *Magnetic Ore Co. v. Marbury Lbr. Co.*, 104 Ala. 465; *Hoit v. Stratton Mills*, 20 Am. Rep. 119; *White v. Foster*, 102 Mass. 379; *Mee v. Benedict*, 57 N. W. 175; *Halstead v. Jessop*, 49 N. E. 822. The two interests, the soil and the timber when separated in ownership become distinct and separate and one is no less a distinct property right and a distinct interest in the land than the other.—*Rothschilds v. Bay City Lbr. Co.*, 139 Ala. 576. The title to real estate cannot be divested without writing even upon the high moral principle of an estoppel.—*Hicks v. Swift Creek Mill Co.*, 133 Ala. 411. It is thoroughly settled that the limitations of time within which the trees may be removed may be waived or extended by parol.—*Grady v. D. R. & R. Co.*, 28 N. Y. Sup. 121; *White v. Foster*, *supra*.

A. L. MCLEOD and WILLIAM D. DUNN, for appellee.—If the defendant is liable in conversion, it is liable as a willful trespasser for the highest value proved.—*White v. Yawkey*, 108 Ala. 270; 106 U. S. 432; Ency. of Law, 28, 811 C.; 28 Sou. Rep. 682.

Appellants, defendant in the court below, not having cut and removed the timber in the two years time limit forfeited its right thereto and the cutting and removal of the same by it, afterwards, was a willful trespass.—Ency. of Law, Vol. 28, 541, and authorities under note 4, p. 543; *Kellam v. McKinstry*, 69 N. Y. 265; *Drake's Cases*, 11 Allen Rep. (Mass.) 141; *Fletcher v. Livingston*, 26 N. E. Rep. (Mass.) 1001; *Perkins v.*

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*Stockwell*, and authorities therein, 131 Mass. 529;  
*White v. Foster*, 102 Mass. 375, 28 Sou. Rep. 543.

DENSON, J.—The complaint contains three counts. The first is trover for the conversion of a lot of timber alleged to have been cut from certain lands described in the count. The second count is in trespass, and counts for recovery on the cutting of timber by the defendant on the lands described in the first count of the complaint. The third count is for trespass on the same lands, without any averment particularizing the acts of trespass. The controversy in the case grew out of the purchase and sale of growing pine timber on land of which Bettie Daffin was the owner at the time of the purchase and sale. On the 11th day of November, 1901, Bettie Daffin and her husband sold to the defendant (appellant) "all the pine timber, twelve inches in diameter and up," then standing and being on certain lands described in a conveyance which they on the same day executed to the defendant, and which is in the following language:

"State of Alabama, Clarke County.

"Know all men by these presents, that, for and in consideration of nine hundred and sixty dollars, we do, grant, bargain, sell and convey unto the C. W. Zimmerman Mfg. Co. all the pine timber, twelve inches in diameter and up, now standing and being on the following described lands, situated in Clarke county, Alabama, to-wit: Northeast quarter of northeast quarter, south half of northeast quarter, north half of southeast quarter, section 20, west half of northwest quarter, section 21, township 8 north, range 3 east. To have and to hold to C. W. Zimmerman Mfg. Co., their successors and assigns, forever. And we covenant with the C. W. Zimmerman Mfg. Co., that we are seized in fee of the said premises, and that we will warrant and defend the same to the said C. W. Zimmerman Mfg. Co. against the lawful claims of all persons whomsoever. For the same consideration we do grant to C. W. Zimmerman Mfg. Co. free rights of way over and across any lands owned by us for all railroads, dirt roads, and log ditches, which it may desire to construct.

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"The said C. W. Zimmerman & Co. is allowed two years from this date within which to cut and remove the timber herein above conveyed.

"Witness our hands and seals this the 11th day of November, 1901.

"W. W. Daffin. (L. S.)

"Bettie Daffin. (L. S.)"

Mrs. Daffin died, leaving surviving her several children and her husband. The husband is the sole plaintiff in this case. The timber was cut on the land after the expiration of the time limit specified in the contract, and after the death of Mrs. Daffin.

The first contention of the appellant requires us to construe the contract of sale and determine the interest of the parties in the timber. The plaintiff's contention is that the defendant (grantee in the conveyance), not having cut and removed the timber within the time limit fixed in the second paragraph of the sale contract, forfeited its title to the timber; and this contention prevailed in the trial court. The defendant's contention is that the conveyance is absolute, carrying and vesting the title to the timber in the grantee, and that the time limit for cutting and removing simply limits its right of the use of the soil for keeping and maintaining the trees or timber on it.

The precise question has never been before this court for consideration. But such contracts have been frequently considered and construed by the courts of other states, and the decisions are not by any means harmonious. In 28 Am. & Eng. Ency. Law (2d Ed.) p. 541, we find this statement in respect to such contracts: "Contracts for the sale of standing trees to be removed within a specified time has generally been construed by the courts as sales of only so many trees as the vendee might cut and remove within the time designated; the balance remaining the property of the vendor." Many cases are cited in note 9 to support the statement. The note includes cases from the courts of Georgia, Maine, Massachusetts, Michigan, Minnesota, New York, Ohio, Vermont, and Wisconsin. There is this further statement of the law in the Encyclopedia above quoted from:

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"Such a sale may, however, be regarded as absolute, and the agreement to remove as a covenant, in which case the timber remains the property of the purchaser, although not removed within the time provided for, and for the failure to remove the vendor may bring an action on the covenant. A wrongful taking of the timber by the vendor would in such a case constitute a conversion, for which the purchaser would have a right of action." In support of this statement the decisions of the courts of Alabama, Indiana, Michigan, and Massachusetts are cited in note 1. In addition to the cases cited in the Encyclopedia, we have found and examined many others.

To review all the cases would extend this opinion to very great length, but in reading the different cases it has been found that each of them turned upon the terms of the particular contract then under consideration. In the case of *Mengal Box Co. v. Moore & McFerrin*, a Tennessee case, reported in 87 S. W. at page 415, Judge Wilkes reviews many of the cases and announces the ruling made in each of them. The conclusion reached by Judge Wilkes in that case, that the time limit of five years fixed in the contract he was construing defeated the title of the grantee if the trees were not cut within the limit, cannot aid us here, because the peculiar terms of that contract are entirely different from those of the one we have in hand. In the case of *Hodges v. Buell*, 95 N. W. 1078, the Supreme Court of Michigan had under consideration a deed to land with this reservation in it: "First party (grantor) reserves all saw timber on said land, with right to enter upon and remove same within two years; also right to build roads across and cross said land within two years from date." After reviewing many cases, especially the Michigan cases, the court held that the title to the timber standing at the expiration of the time limit and that was cut after the time limit passed to the grantee in the conveyance. But we do not consider that case as one deciding the question we have in hand, because of the difference in the contracts, and it is referred to particularly for the reason that it is one in which the cases have been reviewed and

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in which the variant rulings are set forth. Suffice it to say, there are cases which hold that the title under such contracts remains in the grantee after the time limit has passed, though without legal right on his part to enter within the close of the grantor to take and remove the trees.—*Holt v. Stratton Mills*, 54 N. H. 109, 20 Am. Rep. 119; *Irons v. Webb*, 41 N. J. Law, 203, 32 Am. Rep. 193; *Bennett v. Victor Lumber Co.*, 28 Pa. Super. Ct. 495. And, on the other hand, there are cases holding that the title of the grantee terminates with his right of entry.—*Saltonstall v. Little*, 90 Pa. 422, 35 Am. Rep. 683; *Golden v. Glock*, 57 Wis. 118, 15 N. W. 12, 46 Am. Rep. 32; *Boisaubin v. Reed*, 41 N. Y. 323; *Macomber v. Detroit, Lansing, etc., R. R. Co.*, (Mich.) 66 N. W. 376, 32 L. R. A. 102, 62 Am. St. Rep. 713; *Baxter v. Mattox*, 32 S. E. 94, 106 Ga. 344; *Chester v. Green*, (Ky.) 86 S. W. 1122; *Williams v. Flood*, 63 Mich. 487, 30 N. W. 93.

In this jurisdiction the case nearest in point is that of *Magnetic Ore Co. v. Marbury Lumber Co.*, 104 Ala. 465, 16 South 632, 27 L. R. A. 434, 53 Am. St. Rep. 73. A careful reading of that case would seem to lead to the conclusion that our court is committed to the proposition that by the failure to remove the timber within the time limit the purchaser does not, under a deed like the one here involved, forfeit his right and title to the timber. The facts of that case, briefly stated, are: The Louisville & Nashville Railroad Company in 1881, by deed of conveyance regularly executed, sold and conveyed absolutely the "saw timber" growing on certain lands to the Marbury Lumber Company. No time limit was fixed in the conveyance for the cutting and removal of the timber. In 1886 the railroad company by deed of conveyance sold and conveyed the lands to De Bardeleben, with this provision or reservation: "But it is understood and agreed that the timber, with right of way to reach same, has been sold." In February, 1888, De Bardeleben conveyed the land to the Magnetic Ore Company. The contention of the ore company in that suit with respect to the title of the lumber company to the timber was that, "as the deed of conveyance for the 'saw timber' did not specify any time within which the timber was to be cut and removed, the law supplies a pro-



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vision to the effect that it was to be cut and removed within a reasonable time, and that, the lumber company having failed to do this within a reasonable time, the right to the saw timber was forfeited, and became the property of the ore company. The court, in respect to the contention, through Coleman, J., said: "There ought to be some cogent reasons compelling such a conclusion, or decisions to that effect which have established a rule of property, before we should adopt it as law." And in the very conclusion of the opinion the court said: "Complainant's whole case, as we construe the bill and brief of counsel, is rested upon the proposition that, as defendant failed to cut and remove the timber within a reasonable time, he thereby forfeited whatever of property interest he purchased and acquired by the deed of conveyance from the owner, and the saw timber, by reason of the forfeiture, became vested in the complainant, although it was expressly reserved from the sale to De Bardeleben in the deed to complainant (the ore company). We do not assent to the proposition." A fair resume of the holding in the case is that, when standing timber is sold and conveyed and no time fixed for the removal of the timber, the purchaser has a reasonable time within which to enter and cut the timber and remove it, and if he fails to act within a reasonable time he thereby forfeits the right to enter the premises, and would be liable in an action *quare clausum*, but would not be liable *de bonis* or for the conversion of the timber.—*Holt v. Stratton Mills*, 54 N. H. 109, 29 Am. Rep. 119.

It is insisted by appellee that the case is not applicable, for the reason that no time limit is expressed in the deed involved there. But this court has held that when there is a conveyance of land, and a reservation of growing trees, and no time is fixed for their removal, a reasonable time only is allowed in which the entry can be made for the purpose of taking the trees off the land.—*Heflin v Bingham*, 56 Ala. 566, 28 Am. Rep. 776. And it was said by the Supreme Court of Tennessee, speaking in respect to such contracts where no time limit is fixed: Under such contracts, after the expiration of such period, the same question would be presented as

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with trees remaining after the lapse of a fixed period in contracts containing a limitation as to time. For the first class of contracts the law does for the parties what they have done for themselves in the other class."—*Carson v. Three States Lumber Co.*, (Tenn.) 91 S. W. 53. Without the last paragraph in the deed involved in this controversy, manifestly the deed would be an absolute conveyance of the title to the timber to the grantee; and it would come directly within the influence of the ruling made in the case of *Magnetic Ore Co. v. Marbury Lumber Co.*, *supra*. The question is, then, what effect on the title has the last paragraph of the deed—the time limit? What is its field of operation?

To adopt the insistence of the appellee—plaintiff below—would give the paragraph the effect of a condition or proviso to the granting clause of the deed, and, although the grantee paid full value for the trees, yet, by its failure to cut and remove the trees within the two years a forfeiture of the title would be worked. "A deed will not be construed to create an estate on condition, unless language is used which, according to the rules of law, *ex proprio vigore*, imports a condition, or the intent of the grantor to make a conditional estate is otherwise clearly and unequivocally indicated. Conditions are not to be raised readily by inference or argument."—2 Devlin on Deeds, § 970; *Elyton Land Co. v. Railroad*, 100 Ala. 396, 14 South. 207; *Rawson v. Inhabitants, etc.*, 7 Allen 125, 83 Am. Dec. 670; *Hoyt v. Kimball*, 49 N. H. 322; *Thornton v. Trammell*, 39 Go. 202. It is a general principle and rule that conditions subsequent are not favored in law, and must be strictly construed, "because they tend to destroy estates, and a vigorous exaction of them is a species of *summum jus*, and in many cases hardly reconcilable with conscience."—4 Kent, 129; *Thornton v. Trammell*, *supra*. "And, if it be doubtful whether a clause in a deed imports a condition or a covenant, the latter construction will be adopted."—*Hoyt v. Kimball*, *supra*, and authorities there cited. In applying rules of construction, the language employed in the instrument, the circumstances under which the contract was made, and the purpose for which it was made, are to be taken into consideration.

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"The operative words in the conveyance express the intention to sell and convey the standing timber as timber attached to and a part of the freehold, by which a present title was to pass, and cannot be construed into an executory agreement to sell and convey the timber when it should be thereafter severed. The deed conveyed an interest in the land, and is such as the statute of frauds requires to be in writing to the valid."—*Heflin v. Bingham*, 56 Ala. 566, 28 Am. Rep. 776; *Magnetic Ore Co. v. Marbury Lumber Co.*, 104 Ala. 465, 16 South. 632, 27 L. R. A. 434, 53 Am. St. Rep. 73; *Rothschild v. Bay City Lumber Co.*, 139 Ala. 571, 36 South. 785; *Owens v. Lewis*, 46 Ind. 489, 15 Am. Rep. 295; *Neils Lumber Co. v. Hines*, 93 Minn. 505, 101 N. W. 959; *Slocumb v. Seymour*, 36 N. J. Law, 138, 13 Am. Rep. 432. When conveyed, it was an interest in lands, and did not cease to be thereafter until severance.

If the limitation as to time of cutting and removal should be construed as a covenant on the part of the purchaser that it would cut and remove the timber in the time specified, the title to the timber would remain in the purchaser after the time limited had expired, and he could still enter upon the premises and remove the same at his pleasure, being liable to the vendor for such damages as he should cause in so doing. The vendor would also have a right of action against the vendee for a breach of the covenant in not performing the covenant as agreed; or it may be that the vendor would be entitled to remove the timber after the time limit himself, but not to appropriate it to his own use. In the case of *Walker v. Johnson*, 116 Ill. App. 145, in construing a contract similar to the one here under consideration, the Illinois court held that the time-limit clause should be treated as a covenant, and not a condition to base a forfeiture upon. On the other hand, the Supreme Court of Michigan, in the case of *Williams v. Flood*, 63 Mich. 487, 30 N. W. 93, held to the other view. But there is some difference in the terms of the contract construed by the Michigan case and the present contract. Furthermore, the Michigan court does not discuss or apply the rule of construction in respect to conditions subsequent

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referred to above, and the case seems to have been determined on the doctrine *ab inconvenienti*.

If, in the present case, the intention of the grantors that the title to the timber should revert to them on failure of the grantee to cut and remove it within the time specified, it would have been an easy matter to have expressed it in the deed; but on the face of the instrument it is at least a question of doubt as to whether the limitation is a condition subsequent of the contract of sale or a covenant, and, following the trend of the authorities above referred to in respect to the construction to be adopted when such question is doubtful, and in the light of the ruling in the case of *Magnetic Ore Co. v. Marbury Lumber Co.*, *supra*, we hold that the clause or paragraph in the deed in respect to the time for cutting and removing the timber is a covenant, and does not operate a forfeiture of the title on the failure of the vendee to cut and remove the timber within the time specified.—*Magnetic Ore Co. v. Marbury Lumber Co.*, *supra*; *Howard v. Lincoln*, 13 Me. 22; *Goodwin v. Hubbard*, 47 Id. 595; *Knotts v. Hydrick*, 12 Rich. Lew, 314; *Halstead v. Jessup*, 150 Ind. 85, 49 N. E. 154. It follows that the court erred in declining to admit the deed as evidence at the time it was first offered, and this error was not cured by the subsequent admission of the deed by the court, because the limitation put upon the deed by the court was improper, and not in harmony with the construction here given the deed.

It also follows that charge 1, requested by the defendant, should have been given. The foregoing makes it unnecessary to consider charges 2, 3, and 4, refused to the defendant. Charge 5, refused to the defendant, is bad in form and was properly refused. Charge 6, requested by the defendant, should have been given.

Refused charges 7 and 8 involved the question of plaintiff's right to maintain the suit on any count of the complaint; he being only a life tenant. A life tenant cannot maintain trover for the conversion of trees, nor trespass de bonis for the taking of them. This results from the nature of his interest in the premises, but he may maintain trespass *quare clausum fregit*.—18 Am. & Eng. Ency. Law, 450, 453; 15 Ency. Pl. & Pr.

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519, 520; 1 Washb. on Real Property, § 303; *Garnett Smelting Co. v. Watts*, 140 Ala. 449, 457, 37 South. 201; *Alexander v. Fisher*, 7 Ala. 514. Under the construction we have placed on the deed, the plaintiff may maintain trespass quare clausum against the grantee who enters after the time limit, and recover for such actual damages as he may sustain to his possession. But the undisputed proof in the case shows that no appreciable damage was done the soil or to plaintiff's possession; hence charge 7, which asserts that the defendant could not recover more than nominal damages, should have been given. The eighth charge precludes the plaintiff from a recovery of nominal damages, and was properly refused.

It is unnecessary to consider the oral charge of the court in respect to the measure of damages, further than to say that it is erroneous.

Reversed and remanded.

TYSON, C. J., and HARALSON and SIMPSON, JJ., concur.

## Woodstock Iron Works v. Kline as Administrator.

*Action for Damages for Personal Injury to Employee.*

(Decided March 2, 1907. 43 So. Rep. 362.)

1. *Master and Servant; Death of Servant; Instructions.*—The fact that a minor servant, who is inexperienced, expresses a willingness to undertake the perilous work does not relieve the master of the duty of giving him proper instructions, unless the servant gives assurance that he understands the details of the work undertaken.
2. *Evidence; Absent Witnesses; Testimony at Former Trial.*—A sufficient predicate is shown for the introduction of the testimony of a witness taken on the former trial of the same case where it appears that a subpoena had been returned, after diligent search and inquiry for the witness, endorsed not found, and it

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further appears that the witness had left the county for his home in another state.

3. *Same; Expert Opinion; Relevancy.*—It was competent and not irrelevant to show by a railroad man, shown to be an expert, as to whether the letting of seven empty cars down an incline twenty feet high was dangerous and perilous to the person riding them down.
4. *Same; Experts; Competency.*—One who had worked occasionally at railroad breaking, but who could not say that he understood the business thoroughly, was not competent to testify as to the difficulty or not of stopping a string of seven empty cars equipped with two brakes, going down an incline twenty feet high, before they reached a certain crossing.
5. *Master and Servant; Injury to Servant; Orders of Foreman; Instructions.*—A charge asserting that if the employe stated to his foreman that he would ride the cars down, and the foreman thereupon told him to get on at the double brakes and hold the cars, such directions would constitute an order on the part of the foreman to employe to ride the cars down the incline, was properly given.
6. *Trial; Misleading Instructions.*—A charge asserting that if riding the cars down the incline was perilous and the jury should further find that the peril was obvious to the person riding them, he could not recover, is misleading and properly refused.
7. *Same; Instructions Covered by Instructions Given.*—The court will not be put in error for refusing instructions substantially covered by instructions given.
8. *Same; Argumentative Instructions.*—A requested charge that no duty rested on the foreman to instruct the employe about riding the cars down the incline, if the danger was obvious and the employe was sufficiently developed to understand the dangers, was argumentative and properly refused.
9. *Same; Conformity to Facts and Evidence.*—A requested instruction that although the jury might believe that the foreman ordered the employe to ride the cars down, yet if such order was not the cause of the accident, and the employe's death resulted from such other cause, plaintiff could not recover, authorized the jury to speculate as to the cause and was properly refused.
10. *Same; Abstract Instructions.*—A charge asserting that if the jury believe that in the natural course of events deceased would have spent all his earnings in maintaining himself during life, if he lived out his expectancy, plaintiff could not recover was properly refused as being abstract.
11. *Same; Applicability to Issues.*—A charge asserting propositions not raised by the pleading, or that go beyond the issues, is properly refused.

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12. *Death; Right to Sue; Personal Representative.*—The personal representative of an intestate may bring an action for his wrongful death.
13. *Same; Pleadings; Complaint; Existence of Heirs.*—It is not necessary to allege or prove that intestate left any heirs at law surviving him in order to enable his personal representative to maintain suit for his wrongful death.
14. *Death; Damages; Nominal Damages.*—In the absence of distributees of decedent's estate a recovery for his wrongful death is limited to nominal damages.
15. *Same; Damages; Proof.*—Proof of deceased's earning capacity, his age, life expectancy, habits of industry, business, etc., constitute sufficient proof from which pecuniary compensation might be awarded in an action for his wrongful death.
16. *Limitation of Action; Commencement of Action; Amendment.*—Intestate was killed Nov. 13, 1901, and suit for his death was commenced Nov. 12, 1902, and an amendment to the declaration was filed Dec. 4, 1905. Held, that the amendment was not barred by the statute of limitations, if within the lis pendens.

#### APPEAL from Anniston City Court.

Heard before Hon. THOMAS W. COLEMAN, JR.

Action by Charles D. Kline, as administrator of the estate of Sydney Olive, against the Woodstock Iron Works. From a judgment for plaintiff, defendant appeals. Affirmed.

The first count complains of the negligence of the defendant's yardmaster, Fipps, in ordering the intestate to serve as a brakeman without informing him of the dangers and perils incident thereto, knowing that he was a minor and without experience as a brakeman. The fourth count substantially averred that on the 13th of November, 1901, the defendant was engaged in operating an iron furnace, and that it operated a railroad track running from an elevation to the ground and connected with the switch track; that the intestate was employed as a brakeman, and inexperienced in said work and employment, in running cars on said track, which was dangerous and perilous; that Fipps was defendant's yard foreman, and had superintendency intrusted to him of said track and switch, and of intestate, and that intestate conformed to the orders of said Fipps; that Fipps ordered plaintiff's intestate to get on a train

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of seven cars, and ride them down the incline, and stop them on the switch track; that in obedience to the orders plaintiff's intestate got on the cars and stated them down the incline from the stockhouse towards the switch track, lost control of them, and they collided with a car standing on the switch track, so that the intestate was thrown from the car and run over; and that his death was proximately caused by the negligence of Fipps in causing intestate to work at said employment, and negligently failing to warn or instruct, or see that he was warned or instructed, of the dangers of riding the cars down the incline—the plaintiff's intestate being inexperienced, and Fipps having knowledge of his inexperience.

The evidence tended to show that plaintiff's intestate was about 18 1-2 years old, a bright and intelligent boy, youthful in appearance, sober and industrious; that the defendant was operating an iron furnace, and that in operating this furnace it operated a railroad track from the ground, where it connected with the main switch track, upon an incline trestleway, into its stockhouse; that in getting cars out of the stockhouse the engine would start the cars over the incline, cut loose from the cars, and run on ahead into a switch track, leaving the cars to be braked down into the main switch track. It was further shown that on the 12th day of November, 1901, Fipps was a yardmaster, and employed plaintiff's intestate to work about the furnace at \$1.25 a day; that he did not put him to braking cars that day, but on the 13th day of November put him to braking cars down the incline. It was shown that on the morning of the 13th three empty cars were pulled out of the stockhouse, and plaintiff's intestate rode the same down the incline in safety and stopped them on the switch track. At a later hour on the same morning seven empty cars were pulled out, and as they were being started down the incline Fipps said to intestate that he (Fipps) would ride them down, and intestate replied, "No, I will ride them down," and Fipps said, "Well, then, get on at the double brake and ride them down and if they stop on the crossing or before they get to the crossing, we will pole them over." Plaintiff's intestate got on the cars



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and proceeded down the incline, and the cars got out from under his control, ran down the incline, and collided with a freight car on the switch track, throwing intestate between them and running over him. The evidence tended to show, also, that it was more difficult to ride down seven cars in safety than three, and that it would require skill and experience to carry seven cars down the incline. There was conflict in the testimony as to whether or not deceased attempted to apply the brakes, and as to whether the danger was apparent or latent. The other facts appear in the opinion of the court.

The defendant requested the following charges, which were refused: (1) "The court charges the jury that, unless they are reasonably satisfied from the evidence that Fipps ordered Olive to ride said cars down the incline, plaintiff is not entitled to recover." (2) "If the jury should find from the evidence that riding said gondola cars down said incline was dangerous and perilous, and if they further find from the evidence that the danger of so riding said cars down said incline was an obvious danger, and one that was apparent to plaintiff's intestate, then he cannot recover in this suit." (4) "The court charges the jury (affirmative charge as to fourth count.)" (5) "The court charges that no duty rested upon Charles Fipps to instruct Sydney Olive about riding the seven gondola cars down the incline, if the danger and peril of riding said cars down was obvious and apparent to said Olive, and he was developed physically and mentally sufficiently to appreciate and understand the danger." (8) "The court charges the jury that if Sydney Olive appeared to Charles Fipps as being 21 or 22 years of age at the time he came to work at the said switch engine with said Fipps, and if said Fipps from his appearance believed that said Olive was as old as his appearance indicated, then no duty rested upon Fipps to instruct him as to any dangers incident to riding gondola cars down said incline, whether Olive was experienced or inexperienced as a brakeman." (14) "The court charges the jury that, although they may believe from the evidence that Fipps ordered Olive to ride the cars down, yet, if such orders of Fipps was not the

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cause of the accident to Olive, but that death to Olive was caused by some other cause, plaintiff is not entitled to recover." (17) "The court charges the jury that if they believe the evidence they cannot find against the defendant for more than nominal damages." (25) "The court charges the jury, if they believe from the evidence that in the natural course of events Sydney Olive would have spent all his earnings on his sustenance and maintenance during his lifetime, if he had lived his expectancy, the plaintiff is not entitled to recover." (26) "The court charges the jury that if there was a safe way of riding said gondola cars down the incline and there was an unsafe way of riding the same down, and if they further believe from the evidence that Sydney Olive knowingly chose the unsafe way, then the plaintiff cannot recover." (28) "The court charges the jury that there is no evidence in this case that the defendant knew that the plaintiff's intestate was a minor." Charge 31 was practically the same as charge 5. (32 "The court charges the jury that, if they should find any damages against the defendant, such damages could be nothing more than nominal damages, and no damages or verdict can be rendered against the defendant, even for a nominal amount, unless the plaintiff has proven his case."

At the request of the plaintiff, the court gave the following charges: "(1) If the jury are reasonably satisfied, from all the evidence, that Fipps offered to ride the cars down, and Sydney Olive said, 'I will ride them down,' and that Fipps then said, 'Get on there at the double brakes and hold them,' this would constitute in law an order on the part of Fipps to Sydney Olive to ride the cars down the incline. (2) The court charges the jury that the cause of action in this case is not barred by the statute of limitations of two years. (3) The court charges the jury that the cause of action is not barred by the statute of limitations of one year. (4) The court charges the jury that if they believe from the evidence that Charles Fipps said to plaintiff's intestate, Olive, 'Well, go and get on at the double brakes on the cars and hold them,' this was as a matter of law, an instruction by said Fipps to plaintiff's intestate.

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The application for a new trial was based upon errors as alleged and discussed in this opinion. There was verdict for plaintiff in the sum of \$2,000.

BLACKWELL & AGEE, for appellant.—Counsel discuss the assignments of error predicated on the admission and exclusion of evidence but cite no authority. An employe of intelligence and understanding, although a youth of eighteen or nineteen years assumes the ordinary risks of his employment.—*Williams v. S. & N. R. Co.*, 91 Ala. 640; *Mary Lee C. & Ry. Co. v. Chambliss*, 97 Ala. 178; *L. & N. R. R. Co. v. Stutz*, 105 Ala. 369; *Boyd v. Indian Head Mill*, 131 Ala. 356; *Southern Ry. Co. v. Guyton*, 122 Ala. 231; *Alabama Min. R. R. Co. v. Martin*, 128 Ala. 355; 1 Labatt on M. & S. § 291. Where the danger is obviously perilous and appreciated and understood by the employe he cannot claim indemnity for having obeyed the order.—1 Labatt on M. & S. §§ 442-3. There is no duty on the master to warn a servant as to obvious danger.—*L. & N. R. R. Co. v. Boland*, 96 Ala. 632; *Holland v. T. C. I. & N. R. R. Co.*, 106 Ala. 641; *L. & N. R. R. Co. v. Bouldin*, 121 Ala. 197; *Worthington & Co. v. Goforth*, 124 Ala. 655; *N. Bir. S. Ry. Co. v. Wright*, 130 Ala. 419. If there is any doubt whether or not the danger is obvious it becomes a question for the jury.—*Whatley v. Zenida Coal Co.*, 122 Ala. 118. Where there are two ways of doing a thing the duty is upon the employe to select the safer way.—*Davis v. Western Ry. Co.*, 107 Ala. 626; *M. & B. R. R. Co. v. George*, 94 Ala. 218; *M. & B. R. R. Co. v. Holborn*, 84 Ala. 133; *L. & N. R. R. Co. v. Orr*, 91 Ala. 548; *Highland Ave. & Belt R. R. Co. v. Walters*, 91 Ala. 443. There is no duty to instruct as to patent dangers.—*Ala. Min. R. R. Co. v. Marcus*, 115 Ala. 389; *L. & N. R. R. v. Binion*, 107 Ala. 645; *L. & N. R. R. Co. v. Boland*, 96 Ala. 632. Plaintiff's intestate was killed when he was between eighteen and nineteen years of age and at a time when his father was drawing his money so his administrator cannot recover for the period covered by his minority.—*Williams v. S. & N. A. R. R. Co.*, 91 Ala. 635; *A. C. C. & C. Co. v. Pitts*, 98 Ala. 285; *T. C. I. & R. R. Co. v. Herndon*, 100 Ala. 456. The measure of

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damages in cases of this character is clearly laid down in the case of *Fordyce v. McCants*, 4 L. R. A. 296. The duty was upon plaintiff to furnish data to enable the jury to ascertain with reasonable certainty the amount of damage.—*L. & N. R. Co. v. Orr*, 91 Ala. 553; *A. G. S. R. R. Co. v. Hall*, 105 Ala. 607.

LAPSLEY & ARNOLD, for appellee.—A sufficient predicate was shown for the introduction by Olive of the former testimony of Fipps, an absent witness, and the court did not err in its admission.—*Lowrey v. The State*, 98 Ala. 45; *Jacobi v. The State*, 133 Ala. 1; *Mitchell v. The State*, 114 Ala. 1; *Lowe v. The State*, 86 Ala. 47; *Burton v. The State*, 107 Ala. 68. The court did not commit error in refusing the written charges requested by defendant. With the possible exception of charge 1, all the other charges were covered by written instructions given at the request of defendant.—*A. G. S. Ry. Co. v. Burgess*, 116 Ala. 509; *L. & N. R. R. Co. v. Hurt*, 101 Ala. 34; *K. C. M. & B. R. R. Co. v. Burton*, 97 Ala. 240. Charge 1 was not applicable to all the counts of the complaint.—*Arndt v. Cullman*, 121 Ala. 552. The cause of action as differently laid in the different counts of the complaint is predicated on the principles of law as declared in the following cases.—*Mary Lea C. & Ry. Co. v. Chambliss*, 97 Ala. 177; *A. S. & W. Co. v. Wrenn*, 136 Ala. 479; *Ala. Min. R. R. Co. v. Marcus*, 128 Ala. 355; *Robinson Mining Co. v. Tolbert*, 132 Ala. 466. The law will presume that there are surviving relatives entitled to inherit.—*James v. R. & D. R. R. Co.*, 92 Ala. 235.

HARALSON, J.—The pleadings were settled on a former appeal.—143 Ala. 632, 42 South. 27. There were then three counts in the complaint, and five pleas of contributory negligence. Another count, the fourth, since the reversal and remandment of the cause, was added. The case was tried, the last time, on the first count, which was filed under subdivision 3 of section 1749 of the Code of 1896—employer's liability act—and the fourth count, which was under subdivision 2 of said

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section. To this count defendant pleaded the statute of limitations of one and two years.

1. On the former appeal it was held that a minor, such as deceased was, 18 1-2 years old, is presumed to have the same intelligence in assuming the risks of an employment, as an adult has. It was averred in the first count, that the deceased was a minor and without experience as a brakeman, which position he filled when he was killed. If the deceased was inexperienced and needed special instruction, this was a matter to be shown by the plaintiff's evidence in the cause.

It was further held, that when a minor reached the age at which he is presumed to have sufficient intelligence to assume the risks of the employment, and gives assurance that he understands the details of the position assumed by him, it is not incumbent on the employer to give him special instructions; but, if he is inexperienced, and not supposed to be acquainted with the dangers of the risk, and expresses a willingness to undertake it, this does not relieve the employer of the duty not to send him on a perilous journey connected therewith, without, at least, giving him proper instructions.

2. There was no error in allowing proof of what the absent witness, Fipps, swore on the former trial. A sufficient predicate had been laid therefor in the evidence of Olive, Hubbard, Woodruff and Boozer. It was shown that a subpoena issued for him as a witness in the case, to the sheriff of Calhoun county; that the sheriff made diligent search and inquiry for him and could not find him, and that Fipps left the county and said, on leaving, that he was going back to his home in Tennessee where he lived.—*Percy v. State*, 125 Ala. 52, 27 South. 844; *Jacobi v. State*, 133 Ala. 1, 32 South. 158; *Perry v. State*, 87 Ala. 30, 6 South. 425; 3 Mayfield's Dig. 498, § 1235.

The addition of count 4, after the former trial, did not affect the competency of this evidence. It made no new case, and nothing in it affected the witness' former testimony. What he then said was as applicable to the case with, as without the fourth count.

3. The witness, O'Rourke, was asked by the plaintiff: "As a railroad man I will ask you, whether or not let-

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ting empty cars, say seven empty cars down an incline 20 feet high,—down that incline, whether or not in carrying them on down to the track on the ground, is a dangerous business, perilous to the person who rides them down?" and he replied, that it was dangerous. The defendant objected to the question because it called for illegal, irrelevant and immaterial evidence. In argument, counsel insist that the witness was not shown to be expert. He had, however, just testified to facts showing that he was competent on that score, and the evidence was certainly not incompetent or irrelevant under the pleadings.

4. Hill, a witness for defendant, was asked by him, "Whether or not there was any difficulty in stopping a string of seven cars going down that incline with two brakes, before they reached the Oxford Lake crossing?" The plaintiff objected, because the witness was not shown to be an expert. The witness answered questions by the court, that he never followed braking as a business, but he had worked off and on, occasionally, and could not say that he understood the business thoroughly. The court sustained the objection, and it does not appear that it erred in so doing.

5. Having examined the several charges given for the plaintiff, we are impressed that there was no error in giving them.—*King v. Woodstock Iron Co.*, 143 Ala. 632, 42 South. 27.

6. Charge 1, requested by defendant, was properly refused. The first charge requested by plaintiff, held to be proper under the evidence, asserted a contrary principle to the one here set up, instructing that what Fipps said to deceased, as to getting on the cars, amounted to an order for him to do so.

7. Charge 2, requested for defendant, was calculated to mislead the jury, and was properly refused. Furthermore, the principle enunciated in this charge was substantially given in other written charges requested by defendant.

8. Charge 4, which was the affirmative charge as to count 4, was properly refused. There was evidence tending to support said count.

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9. Charge 5 is substantially covered, by given charge 9 for defendant. Charge 31 is argumentative, and was properly refused on that account.

10. The only insistence for charges 8 and 11, requested by defendant, is that there was no evidence tending to show that Fipps knew that deceased was inexperienced, whereas the evidence in the case afforded ground for the inference to the contrary.

11. Charge 14 was correctly refused. It would have been difficult for the jury to understand it. What is meant by the expression, "that the death of Olive was caused by some other cause," is not well understood, and was authorizing the jury to speculate as to the cause, and was calculated to mislead and confuse them. The order of Fipps might have led to the accident without being its cause. The collision of the gondola cars with the standing car on the track was the real cause of the accident. The negligent manner of letting them down the grade, and the want of care in controlling them as they descended may have contributed to bring about this result. As a whole, the charge was well calculated to confuse and mislead the jury.

12. Charges 17 and 32 were properly refused. The suit was properly instituted by the personal representative of the deceased, and it was unnecessary to allege and prove that the deceased left surviving him any heirs at law.—*C. & W. Ry. v. Bradford*, 86 Ala. 574, 6 South. 90. As was said in that case: "A collateral fact of that character, the existence of which in almost all cases is common knowledge will be presumed."

Charge 25 was abstract and not improperly refused on that account. Charge 26 asserts a proposition not raised in the pleadings in the cause and was properly refused.

Charge 28 goes beyond the matters set up in the pleas and shown by the evidence, and was, therefore, properly refused.

In this case it does not appear that there were no distributees of deceased's estate, to whose benefit the money would inure. It is only in such case, that the re-

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covery is held to be limited to nominal damages.—*James v. R. & D. R. R. Co.*, 92 Ala. 231, 9 South. 335; *T. C. C. & I. Co. v. Enslen*, 129 Ala. 348, 30 South. 600. Here it was shown that deceased had a father who survived him, and it was not shown, or attempted to be shown, that he left no other distributees. His earning capacity, his age, probable duration of life, habits of industry as were shown, business, etc., furnishes proper data from which a pecuniary compensation might be fixed by the jury.—*L. & N. R. R. Co. v. Orr* 91 Ala. 548, 8 South. 360; *James v. R. & D. R. R. Co.*, 92 Ala. 231, 9 South. 335; *McAdory v. L. & N. R. R. Co.*, 94 Ala. 272, 10 South. 507; *Tutwiler Coal, Coke & Iron Co. v. Enslen*, 129 Ala. 348, 30 South. 600.

13. It is proper to add that deceased was killed on the 13th of November, 1901, and this suit was commenced on the 12th of November, 1902. The fourth count, by way of amendment to the complaint, was filed on the 4th of December, 1905. It was certainly within the *lis pendens* and was, therefore, not barred.—*Nelson v. First National Bank*, 139 Ala. 578, 36 South. 707, 101 Am. St. Rep. 52.

The motion for a new trial, which we have considered, was, in our judgment properly overruled.—*Reiter-Connolly Mfg. Co. v. Hamlin*, 144 Ala. 194, 220, 40 South. 280.

Affirmed.

TYSON, C. J., and SIMPSON and DENSON, JJ., concur.

## Jones, et al. v. Pioneer Min. & Mfg. Co.

### *Action for Damages for Death of Employee.*

(Decided Jan. 17th, 1907. 42 So. Rep. 998.)

1. *Master and Servant; Injury to Servant; Contributory Negligence.*  
—A plea of contributory negligence, which alleges in the alternative, that plaintiff's intestate knew, or by reasonable care,



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could have known that the compressed air had not been released, was not a sufficient averment of such knowledge on the part of the intestate, knowledge being necessary, under the pleading in this case, to constitute contributory negligence.

2. *Same*.—An employee engaged in repairing a defect in a blowing engine, has the right to presume that his superior, entrusted with superintendence of the work, has discharged his duty and released the compressed air before commencing the work, and he is, therefore, not required to exercise reasonable care to ascertain whether the engine is charged with compressed air or not, and cannot be charged with contributory negligence unless he knew that the compressed air had not been released.

APPEAL from Jefferson Circuit Court.

Heard before Hon. A. A. COLEMAN.

Action by Texie Jones, administratrix, and others, against the Pioneer Mining & Manufacturing Company. From a judgment for defendant, plaintiffs appeal. Reversed and remanded.

WILLIAM E. FORT, for appellant.—The demurrers should have been sustained to the pleas of contributory negligence interposed by defendant.—*Osborne v. Ala. Steel & Wire Co.*, 33 South. 688; *A. G. S. Ry. Co. v. Brooks*, 33 South. 181; *Southern Ry. Co. v. Bunt*, 32 South. 508; *Brown v. L. & N. R. R. Co.*, 111 Ala. 275; *Southern Ry. Co. v. Guyton*, 132 Ala. 238; *Western Ry. of Ala. v. Arnett*, 34 South. 998; *L. & N. R. R. Co. v. Markee*, 15 South. 511; *Southern Ry. Co. v. Shelton*, 34 South. 194.

CAMPBELL & WALKER, for appellee.—The pleas attacked by demurrer are not pleas of assumed risk but are pleas of contributory negligence, and therefore, are unlike the pleas in the cases relied on by appellant's counsel.

DOWDELL, J.—After amendment of the complaint by striking out all counts except those designated as "A," "B," "C," "F," "G," and "H," the defendant to each of these remaining counts along with other pleas, filed plea No. 3, seeking to set up contributory negli-

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gence on the part of the plaintiff's intestate which proximately caused the injury complained of. Demurrers were by the plaintiff interposed to this plea, which upon consideration by the court were overruled. This ruling of the court below is the only one here complained of as error.

The injury which resulted in the death of the plaintiff's intestate was caused by his being struck with the cap of a blowing engine used in the manufacture of iron, which was thrown or propelled against him by the force of compressed air, at the time contained in the blowing engine, and while the employe or employes of the defendant were at work on said engine for the purpose of repairing a defective valve in the same. One of the acts of negligence averred in the complaint consisted in the failure of the person having the superintendence and control of the repair work being at the time done to release or cause to be released the compressed air confined in the engine before removing the nuts and bolts that held the cap onto the engine and striking the cap violently with a wrench, thereby loosening the cap, which was thrown or propelled by the force of the compressed air in the engine against the plaintiff's intestate.

The third plea of the defendant, which undertook to answer this phase of the plaintiff's case by setting up contributory negligence on the part of the deceased, in charging in what the negligence of the deceased consisted, avers "that said intestate stood in front of said cap whilst it was being removed, and whilst the nuts were being removed, and whilst the cap of the cylinder was being struck, as alleged in the complaint, when he knew, or by the exercise of reasonable care would have known, that said air had not been released." It is evident from the pleading that the position of the intestate in front of the cap that was being removed, without the engine being charged with compressed air, was not a dangerous one, and on this fact alone no negligence could be predicated. The position occupied by the intestate was rendered dangerous only by the existence of another fact, and that was that the engine was charged with compressed air, and, in order to impute to him

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negligence, it was necessary to show that he had knowledge of the existence of such fact. This the plea did not show. The averment of the plea was in the alternative—that the intestate knew, or by the exercise of reasonable care would have known, etc. This falls short of an averment of knowledge on the part of the intestate. In this respect the plea was insufficient. The principle laid down in *Osborne v. Ala. Steel & Wire Co.*, 135 Ala. 571, 33 South. 687, and *A. G. S. R. R. Co. v. Brooks*, 135 Ala. 401, 33 South. 181, is applicable here. Other cases might be cited in our Reports, but we deem it unnecessary. Moreover, we think the intestate had the right to presume that his superior, who was intrusted with the superintendence and control, had discharged his duty and first released the compressed air before commencing to work on the engine. And, this being true, no duty rested on the deceased to exercise reasonable care to ascertain whether the engine was charged with compressed air or not.

The court erred in overruling the demurrer to plea No. 3, and for this error the judgment must be reversed. Reversed and remanded.

TYSON, C. J., and ANDERSON and MCCLELLAN, JJ., concur.

## **Southern Coal & Coke Company v. Swinney, pro ami.**

*Suit for Damages for Personal Injury to Employee.*

(Decided Jan. 15th, 1907. 42 So. Rep. 808.)

1. *Master and Servant; Injury to Servant.*—An employee in a coal mine became sick from bad air and quit his work before the end of the day. While going out, he met the superintendent of the mine, who stopped him to inquire why he was quitting his work. He was injured at this point and at that time. Held, that the injury occurred during the course of his employment.

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2. *Same; Contributory Negligence.*—An employee of a coal mine left the mine by the usual and customary way, and under no emergency. Held, that he was not guilty of contributory negligence in going out by the route taken, though there was another way through which he could have passed in safety.
3. *Same; Assumption of Risk.*—An employee going out of a mine at an earlier hour than usual on account of sickness, by the usual route travelled, assumes merely the ordinary risk incident thereto, but does not assume the risk of the master's negligence.
4. *Trial; Instruction; Effect of Evidence.*—A charge that there is no evidence of a defect in the defendant's appliances, and that under the evidence plaintiff's injuries were due to an accident for which defendant is not responsible, invades the province of the jury and is properly refused.
5. *Master and Servant; Injury to Employee; Contributory Negligence; Emergency.*—The rule being that in case of emergency and peril one is not held to that cool and deliberate exercise of judgment in conserving his safety that he would be held to under ordinary circumstances, it cannot be said, as a matter of law, that an employee, who was injured while going out of the mine along a haulage way, by a car which jumped the track, was guilty of contributory negligence in running to "a turnout", rather than to one of the "dog-holes" in the sides of the wall, even if such turnout was a less safe place.
6. *Trial; Instruction; Incomplete Request.*—A charge which is incomplete and unintelligible, is properly refused.
7. *Master and Servant; Negligence; Proximate Cause; Evidence.*—Where the evidence showed that latches in the switch where the accident occurred, were unsafe on a slope, that they were at the time loose and could be thrown by a car passing over the switch so as to change the switch and derail trailing cars, and that immediately after the accident the latches were repaired, it was sufficient to authorize the jury to infer that the derailment causing the accident was the result of a defect in the switch.
8. *Appal; Harmless Error; Instruction.*—It is not reversible error to give a charge correctly stating the law, though such charge be abstract or argumentative.
9. *Master and Servant; Injury to Employee; Negligence; Evidence of Knowledge.*—The evidence tending to show that the condition of the switch was the same at all such times, it was competent to prove accidents or wrecks at the same place shortly before the injury as tending to show knowledge of a defect in the switch on the part of the master.
10. *Trial; Reception of Evidence; Waiver.*—The answer being responsive to the question and no objection having been inter-

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- posed to the question, a motion to exclude evidence on the ground of irrelevancy or immateriality comes too late.
11. *Same; Objection by Party Eliciting Evidence.*—The party who draws out evidence on cross examination, may not move to exclude such evidence.
  12. *Evidence; Experts; Examination.*—A question to an expert concerning the latches in a switch where the injury occurred, "State whether or not these latches are safe on main slopes"; and the expert's answer thereto "I did not take them to be safe", was not open to the objection of calling for and containing a conclusion; it called for and gave the expert's opinion.
  13. *Same; Conclusion of Witness.*—Evidence of a witness that he did not see what plaintiff was doing at the moment of the accident but from his position afterwards, he must have remained sitting, is not a statement of a fact and is a mere conclusion.
  14. *Appeal; Review; Refusal of New Trial; Weight of Evidence.*—The refusal of the trial court to grant a new trial, motion for which is based on the ground that the verdict was against the evidence, will not be disturbed on appeal, where there is evidence tending to support the verdict.

#### APPEAL from Shelby Circuit Court.

Heard before Hon. JOHN PELHAM.

Action by J. E. Swinney, by next friend, against the Southern Coal & Coke Company. Judgment for plaintiff. Defendant appeals. Affirmed.

This was an action for damages for personal injuries to an employe while engaged in the business of the employer, mining coal. The third count is drawn under subdivision 1 of the employer's liability act, and the negligence charged is that a switch in the track upon which said car was running at the time of derailment, at or near the point of said derailment, was defective, so as to cause said car to be derailed as aforesaid. Demurrers were interposed to this count, and overruled; but it is not necessary here to set them out, as they are not noticed in the opinion.

The defendant interposed several pleas of contributory negligence, the first of which is No. 4, and counts upon the negligence of the plaintiff, who, being engaged as a miner to dig coal in No. 5 west turnout, in defendant's mine, quitted his place at which he had been as-

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signed to work, and negligently proceeded out of the mine along the main haulage road therein, and was struck by a train of cars which accidentally jumped the track. Plea 5 counts on the negligence of the plaintiff in quitting the place he had been assigned to work, and proceeding out of the mine along the main haulage way before the time when the miners usually left the mine, and at a time when they were not reasonably expected by those operating the tram cars to pass along that way. Plea 6 counts on the negligence of plaintiff in quitting his place of work and leaving the mine by the main haulage way. It alleges that along said haulage way the defendant had dug or caused to be dug holes, into which persons entered so as to let the cars pass, and that plaintiff at the time of the accident negligently failed to place himself in one of these dog holes, and in consequence was struck by the string of cars. Plea 7 counts on plaintiff's negligence in quitting his place of duty, and alleges that he went out along the main haulage way, and, meeting the superintendent of the mine at the mouth of No. 2 west turnout, he placed himself in the center of a track leading from the main haulage way into No. 2 west turnout, and negligently loitered there, instead of proceeding out of the mine or returning to his duty. Plea 8 alleges negligence on the part of the plaintiff, in that he quit his place of work, and proceeded out of the mine as far as No. 2 west turnout, where he met the superintendent, and where he stopped and took his seat in the center of a side track leading from No. 2 west turnout to the main haulage way, where a trip of cars on the main track coming down into the mine jumped the track about 40 feet away from him, and the plaintiff negligently remained sitting on the track until he was struck by the derailed cars. Plea 9 is the same as 8, except that it alleges that plaintiff negligently failed to get out of the way of the trip of cars. Plea 10 is practically the same as plea 8, and alleges that plaintiff negligently remained sitting or loitering about three or four minutes, when, if he had proceeded on his journey out of the mine, he would have had time to have switched off into any of the dog holes

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provided along the main haulage way. Pleas 11 and 12 are not set out.

The evidence on which the plaintiff relied to support his case under the third count is sufficiently stated in the opinion, as is the evidence relating to contributory negligence.

At the conclusion of the evidence, the defendant requested the following written charges, which were refused: "(4) I charge the jury that, if you believe the evidence in this case, the plaintiff at the time the accident happened was not acting within the line of his duty, and that the defendant in that event owed him no duty other than the duty not to injure him wantonly, intentionally, or recklessly. (5) If the jury find from the evidence that the plaintiff was employed by the defendant to dig coal in No. 5 west turnout in its mines at Glen Carbon, and that he had quit his place of work and proceeded out of the mine along the main haulage way before the miners were accustomed to leave the mine, and got as far as No. 2 west turnout, and there stopped and engaged in conversation for ten minutes, more or less, with the defendant's mine foreman, then during the time he stopped at said place he was a mere volunteer, performing service for and on his own behalf, and not on behalf of the defendant, and your verdict must be for the defendant. (6) The court charges the jury that there was no evidence in this case of any defect of the ways, works, and machinery of the defendant at the time of the accident to the plaintiff, and you must not presume anything. (7) I charge the jury that under the evidence in this case the plaintiff's injuries were due to an accident for which the defendant is not responsible, and there can be no recovery. (8) I charge the jury that if, from the evidence, you believe that the defendant had provided dog holes or safety places for the use of the miners along the main haulage way in its mines, and that the plaintiff, instead of taking one of such dog holes for safety places when he heard the trip of cars coming down the track, took a more dangerous place by standing in No. 2 west turnout, near the main line of defendant's track, he then assumed the risk incident to the derailment of the defendant's cars on its

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track. (9) I charge the jury that if the plaintiff when he proceeded out of the defendant's mine at an unusual hour, when there was apparent danger and risk incident to waking along the main haulage way of the defendant's mine, thereby electing voluntarily to encounter them, and was injured by a train of cars coming down the defendant's track while standing in a position in close proximity thereto, then I charge the jury that he cannot for such accident maintain an action against the defendant. (10) If the jury find from the evidence that the plaintiff was employed by the defendant to dig coal in No. 5 west turnout in its mines, and that he quit his work and proceeded out of the mine at an unusual hour to that in which the miners were accustomed to go out of the mine, and that he proceeded out of the mine along the main haulage way along which trains of cars were being operated, and if you further find that along this haulage way the defendant had provided dog holes or safety ways for the men to stand so that the cars might pass, and if you further find that the plaintiff, instead of going into one of these safety places when he heard the trip of cars coming down the track, remained in No. 2 west turnout, where there were side tracks leading to the main line, a place obviously more dangerous, then I charge you that he contributed to his own injury, and your verdict must be for the defendant. (11) If the jury believe from the evidence that the plaintiff was employed by the defendant to dig coal in No. 5 west turnout in its mines, and that he quit his place of work and proceeded out of the defendant's mine at an unusual hour for the miners thereof so to do, and if you find from the evidence that there was an escape way provided for the miners in said mine, which could have been used by the plaintiff, which was a safer way for him to have gone out at than the main haulage way, and if you find that he elected to take the main haulage way out of the mine, then you must find for the defendant. (12) I charge that if you believe, from the evidence, that the safe place for the plaintiff to have stood as the defendant's train of cars passed by him in its mine, but the plaintiff stood at another and more dangerous place when he could have stood else-



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where along the main haulage way of the defendant's mine, and if you believe that his standing in a more dangerous place contributed to his injury, your verdict must be for the defendant."

The plaintiff requested the court to give the following written charges, to the giving of which the defendant excepted: "(1) It is not required of plaintiff that he should have acted with unusual and more than ordinary prudence, either in going out of the mine or in taking care of his own safety. (2) To make the plaintiff guilty of negligence, the jury must be reasonably satisfied from the evidence that he did something which a reasonably prudent man, acting with reasonable prudence, would not have done under the same circumstances, or that he failed to do something which a reasonably prudent man, acting with reasonable prudence, would have done under the same circumstances. (3) While the jury cannot guess or surmise, the jury are entitled to draw all reasonable inferences from the facts in evidence. (4) In determining whether or not the switch was defective, the jury have the right to weigh all the evidence in the light of their common knowledge, common sense, and common experience. (5) In order to recover a verdict, it is not necessary that the plaintiff prove that he suffered all the damages claimed in the third count. (6) A servant ordinarily has the right to rely on the master having exercised due care to have the ways, works, machinery, or plant in a reasonably safe condition. (7) If the jury find for the plaintiff, they have no right to withhold from the amount of their verdict a single dollar to which, under the evidence and charge of the court, the jury may be reasonably satisfied the plaintiff is entitled. (8) In estimating the amount of damages, if the jury find for the plaintiff, the jury must consider the evidence, if any, tending to show damages, if any, which plaintiff may reasonably be expected to suffer in the future as a proximate result of the negligence complained of, as well as the damages, if any, which the jury may be reasonably satisfied from the evidence plaintiff has suffered in the past as a proximate result of the negligence complained of; provided, that plaintiff cannot recover any damages not

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claimed in the complaint. (9) A servant or employe does not ordinarily assume any of the risks of the business which are brought about by the negligence of the master, or by the negligence of those to whom the master has intrusted the duty of seeing that the ways, works, machinery, or plant were in proper condition. (10) It is the duty of the employer to use due care and diligence to see that its ways, works, machinery, and plant, including a switch in use, if any, are in proper condition; and ordinarily the employe has a right to rely on the presumption that his employer has performed this duty, and that the ways, works, machinery, and plant are in proper condition."

There was verdict and judgment for the plaintiff in the sum of \$2,800.

JOHN F. MARTIN, and W. I. GRUBB, for appellant.—The court erred in refusing to charge the jury that at the time of the accident plaintiff's intestate was not acting within the line and scope of his duty and that the defendant owed plaintiff's intestate no duty other than not to injure him wantonly or intentionally. The court also erred in refusing to charge at the time of the accident plaintiff's intestate was a mere volunteer and not engaged in the employment of defendant.—*Wilson v. L. & N. R. R. Co.*, 85 Ala. 273; *A. G. S. Ry. Co. v. Hall*, 105 Ala. 599; *Mary Lee C. & R. Co. v. Chambliss*, 97 Ala. 131; *Collier v. Coggans*, 103 L. R. A. 281; *McDaniel v. H. A. & B. Ry. Co.*, 90 Ala. 64; *Warden v. L. & N. R. R. Co.*, 94 Ala. 277. The law does not require of defendant to use the latest appliances but only those which are reasonably adapted for the purposes for which they are used.—*Mary Lee C. & R. Co., supra*; *Seaboard Mfg. Co. v. Woodson*, 94 Ala. 143; *Wilson v. L. & N. R. R. Co., supra*; *Smoot v. M. & M. Ry. Co.*, 67 Ala. 20. It is submitted on these authorities that plaintiff failed to make out his case under the 3rd count. The withdrawal of the other counts including the 1st operated to take them out of the case and the part adopted in the 3rd count from the 1st count cannot, therefore, be looked to in aid of the 3rd count.—*Bir. Ry. L. & P. Co. v. Allen*, 99 Ala. 365. The court erred in permit-

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ting the testimony of the two wrecks within a month or two previous to the accident, and the details thereof.—*Bir. U. Ry. Co. v. Alexander*, 93 Ala. 137; *Schley v. L. & N. R. R. Co.*, 100 Ala. 388; *M. & A. of Birm. v. Starr*, 112 Ala. 107.

BOWMAN, HARSH & BEDDOW, for appellee.—The various grounds of demurrer to the complaint were not well taken.—*Bear Creek Mill Co. v. Parker*, 134 Ala. 293; *L. & N. R. R. Co. v. Mothershed*, 12 Suth. 1215; *Mary Lee C. & Ry. Co. v. Chambliss*, 97 Ala. 174; *A. G. S. R. R. Co. v. Davis*, 119 Ala. 572. Upon the recitals in the bill of exceptions the court cannot consider the motion for a new trial.—*McDonald v. Ala. Mid. Ry. Co.*, 123 Ala. 229; *Richter v. Kootman*, 131 Ala. 399; *Bessemer L. & I. Co. v. DuBose*, 125 Ala. 446. Charges 1, 2 and 3 were properly refused.—*Bessemer L. Co. v. Tillman*, 139 Ala. 462. Under the facts in this case the plaintiff was in the employment of defendant and defendant owed him ordinary care.—*Bir. Rolling Mill Co. v. Rockhold*, in MS.

DOWDELL, J.—This is an action by the plaintiff to recover damages for personal injuries received in a coal mine while in the employment of the defendant in mining coal. The complaint contained four counts, to which demurrers were interposed and overruled. The defendant thereupon filed a number of pleas, consisting of the plea of not guilty and special pleas of contributory negligence. Demurrers were sustained to the eleventh and twelfth special pleas, and, issue being joined on the other pleas, a verdict was rendered in favor of the plaintiff. Upon the conclusion of the evidence the court, at the request of the defendant in writing, gave the general charge in favor of the defendant on all of the counts of the complaint except the third count. This latter count was predicated under the employer's liability statute, on a defective switch in defendant's railroad track in the mine, causing a car to be derailed and thrown against the plaintiff, whereby he was injured as charged in the complaint.

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Though the rulings of the court on the demurrers to the complaint and pleas are assigned as error, these assignments are not insisted on by counsel in argument, and therefore will not be considered here; the same being regarded as abandoned.

The first question insisted on by counsel for appellant is one raised by requested instructions to the jury; the insistence being that, the plaintiff at the time of his injury having quit the work to which he was assigned, he was not in the employment of the defendant. The evidence shows that the plaintiff was at work engaged in mining coal at what was known as "No. 5 West Turnout" in defendant's mine on the day of the injury, and plaintiff's testimony was that about 3 o'clock in the afternoon he became sick from bad air caused by blasting in the mine during the day, and quit his work and was leaving the mine by the "haulage way" along the main slope out, when he came to what was known as "No. 2 West Turnout," where the superintendent in charge of the mine and of the employment of the plaintiff stopped plaintiff to inquire of him why he was quitting his work, and became engaged in a conversation lasting about 10 minutes, and it was during this time and at this place that plaintiff was injured by a "trip of cars" descending the slope into the mine, which was derailed and thrown against the plaintiff. The defendant's evidence tended to show that the superintendent of defendant simply asked the plaintiff why he was quitting his work at that time, and that the plaintiff voluntarily loitered at that place, being under no duty to the defendant to remain there, when, if he had proceeded on his way out of the mine, he would have gotten out before the "trip of cars" made the descent, and thereby avoided the accident. If the plaintiff's testimony is to be believed, when he was stopped and engaged in conversation by his superintendent, as testified to by plaintiff, the relation of master and servant during this time was not terminated by such detention or delay of the plaintiff. He was assigned to work at No. 5 west turnout by the superintendent. By the same authority he was detained at No. 2 west turnout, where the injury occurred. The relation between the defendant and

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plaintiff which existed by reason of the employment continued to exist after plaintiff ceased to work until he had left the mine, or had a reasonable time to do so without interruption by no fault of his own. See *Birmingham Rolling Mill Co. v. Rockhold*, 143 Ala. 115, 42 South. 96. Charges 4 and 5, requested by the defendant, besides being otherwise faulty, were opposed to the views above expressed, and were properly refused. The cases of *Wilson v. L. & N. R. R. Co.*, 85 Ala. 269, 4 South. 701, and *Alabama G. S. Ry. Co. v. Hall*, 105 Ala. 599, 17 South. 176, as well as other cases of ours cited and relied on by counsel for appellant, are not in point; the facts in those cases being different from the facts in the case at bar.

While there was an escapeway out of the mine which could be used in cases of emergency, and through which plaintiff might have passed on the occasion with safety upon quitting his work, the evidence showed that the usual and customary way of the miners going out of the mine was through the "haulage way" in the main slope, the route traveled by the plaintiff at the time of the injury. This being true, it cannot be said that the plaintiff, in passing out through the "haulage way," was wanting in the exercise of that ordinary prudence and care which would impute negligence. The plaintiff, in passing out through the "haulage way" in the main slope, assumed the ordinary risks incident thereto in like manner as he assumed the ordinary risks incident to his employment in the digging of coal; but he did not assume the risk of the negligence of the defendant. The defendant's requested instructions to the jury numbered 9 and 11 were opposed to these views, and were properly refused.

Charges 6 and 7, requested by the defendant, were an invasion of the province of the jury, and for that reason, if no other, were properly refused.

Charge 8, requested by the defendant, was faulty in several respects, and especially in putting upon the plaintiff an assumption of risk that might embrace that of the negligence of the defendant. The law is well settled, that, in cases of great emergency and peril, a per-

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son is not held to that cool and deliberate exercise of judgment in conserving his safety that he would be under ordinary circumstances.

The evidence showed that the plaintiff was hurt, not by cars upon the track, but by the cars after they were derailed. The plaintiff, so far as the evidence shows, was in a safe place from the passing of the cars over the track, and would have been uninjured, but for the derailment. His extreme peril and danger arose when the trip of cars descending the main slope jumped the track in close proximity to the plaintiff. His failure under these circumstances to hunt for one of the "dog holes," which had been left along the sides of the main slope at a distance of about 30 feet apart, cannot be charged as contributory negligence on the part of the plaintiff, when in fact he did run to save himself, although the place he sought was less secure than the "dog holes." Charge 10, as requested by the defendant, was opposed to these views, besides being faulty in assuming that No. 2 west turnout, where the plaintiff ran to escape, was obviously more dangerous than the "dog hole." It was, therefore, properly refused. Charge No. 12, requested by the defendant, besides being incomplete, was unintelligible, and for that reason properly refused.

The third count of the complaint counted on a defective switch. It is insisted by counsel for appellant that there was no evidence of any defect in the switch, and that, therefore, the defendant was entitled to the general affirmative charge under this count. There was evidence tending to show that the latches used in the switch were unsafe on a slope, and that the same were at the time loose, and could be thrown by a car passing over the track, so as to change the switch, thereby derailling trailing cars. There was also evidence tending to show that immediately after the accident in question the latches were repaired. Under this evidence, it was open to the jury to infer that the derailment of the cars was the result of a defect in the switch, and therefore it was a question to be left to the jury.

We find no error in the giving of the charges requested by the plaintiff, as each of the charges given correctly

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states the law. The giving of a charge which is abstract or argumentative, when it correctly states the law, will not constitute reversible error.

The sixth assignment of error, insisted on by counsel, relates to the introduction of the evidence. The witness Nabers was asked by the plaintiff with reference to other accidents or wrecks at the same place in defendant's mine before the accident in question, when counsel for defendant interposed an objection, accompanied by a qualification, "unless he (witness) will state what time." The court thereupon adopted the suggestion of counsel and said: "Bring it down to a certain time within a few weeks," and the question was then asked by counsel for plaintiff, "Well, within a few weeks?" To this question the defendant objected upon the ground "that the same was irrelevant, immaterial, illegal, and incompetent," which objection the court overruled. And the witness answered: "It was in a few weeks. It had been a month or two." It was competent, relevant, and material to show that accidents or wrecks had occurred at the same place within a short time previous to the accident in question, as tending to show knowledge on the part of the defendant of the defective condition of the switch at that place. There is evidence tending to show, and from which the jury were authorized to infer, that the condition of the switch as to the loose latches was the same at the time of the accident as at the time of the two previous wrecks. After the further examination by the plaintiff of the witness without objection in regard to two other wrecks at the same place, in answer to a question not objected to, the witness stated: "I said two. There were two wrecks within two months before this one that I know of." The defendant moved to exclude this statement on the ground that it was irrelevant, immaterial, and incompetent evidence. If the grounds stated had been good, no objection having been made to the question, and the answer being responsive, the motion to exclude came too late. The defendant then cross-examined the witness at length, and at the conclusion of his cross-examination the defendant "moved to exclude all the evidence relative to this accident, which defendant had asked about." It

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was not proper for defendant to speculate with the witness on a cross-examination, and then move to exclude the evidence he had drawn out by his cross-examination.

The witness John A. Durden, who qualified as an expert, was asked by the plaintiff upon examination and rebuttal this question: "State whether or not these latches are safe on main slope?" The latches referred to were those on the switch, where the accident and derailment in question occurred. The question was objected to by the defendant upon the grounds, that it called for illegal and incompetent testimony. The witness answered: "I did not take them to be safe." The insistence here is that the question called for a conclusion and that the answer was a conclusion of the witness. This insistence is not tenable. The witness was examined as an expert, and as such only stated his opinion on the facts as to whether the latches were safe ones on the main slope.

There is no error in excluding the statement of the witness Keller, on the motion of the plaintiff, that he (witness) "did not see what the plaintiff did at this particular moment, but, from his position afterwards, he must have remained sitting." This was clearly but an opinion or conclusion of the witness, and not the statement of the fact that the plaintiff remained sitting.

We have considered all questions insisted upon in argument by appellant, except the one relating to the motion for a new trial. The insistence in this respect is that the verdict was contrary to the weight of the evidence, and that the court erred in not granting a new trial on this ground, and, furthermore, that the verdict was excessive. We are not prepared to say that the verdict was excessive, as there was evidence tending to show that the injury received might result in a permanent disability. There was evidence to support the verdict in favor of the plaintiff, and, under the rule laid down in *Cobb v. Malone*, 92 Ala. 630, 9 South. 738, we are not prepared to say that the trial court erred in overruling the motion for a new trial.



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Finding no reversible error in the record, the judgment appealed from will be affirmed.

Affirmed.

TYSON, C. J., and ANDERSON and McCLELLAN, JJ.,  
concur.

## Louisville & N. R. R. Co. v. Dobson.

*Action for Injury to Employee.*

(Decided Feb. 14th, 1907. 43 So. Rep. 138.)

1. *Appeal; Bill of Exceptions; Time of Signing; Record.*—The court adjourned May 24th, and an order granting sixty days from that date for signing bill of exceptions was entered. A further order, undated, extended the time thirty days from July 22nd, was entered. The bill of exceptions was signed after the expiration of the time originally fixed. Held, that the record did not show that the time was extended before the expiration of the time first granted, and the bill of exceptions could not be considered.
2. *Master and Servant; Injury to Servant; Complaint; Sufficiency.*—A complaint, one count of which alleged that while in the employment of the defendant, and in the active discharge of his duties, plaintiff was injured (setting out his injuries), that they were caused proximately by the negligence of a certain flagman in defendant's service, who had charge of the signal for notifying those in charge of trains following defendant's train, and its presence on its main line, and that such flagman negligently failed to set out such signal, etc.; and another count averring said injuries to have been proximately caused by the negligence of a certain person in defendant's employ in failing to have signals placed in the rear of said first mentioned train when the same was stationary, and when another train was approaching such stationary train, or station where said train was, is not demurrable for a failure to show any causal connection between the injuries and the negligence complained of.

APPEAL from Chilton Circuit Court.

Heard before Hon. S. L. BREWER.

[Louisville & N. R. R. Co. v. Dobson.]

Action by George A. Dodson against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

The complaint in this cause, as originally filed, contained eight counts; but on the trial the minute entry recites the plaintiff amended the complaint by striking out all of the counts, except the first and third counts thereof, and these counts are as follows: "Plaintiff claims of the defendant, a body corporate doing business in Chilton county, Alabama, \$30,000.00 damages, for that on, to-wit, February 6, 1904, plaintiff while in the employment of the defendant, and while in the active performance of the duties of said employment, was injured in Chilton county, Alabama, as follows: Plaintiff's left foot, left leg, left thigh, left side of body, and right side of head were severely and painfully lacerated and bruised, and plaintiff's spine was seriously wrenched, thereby causing plaintiff to endure very great physical and mental pain and suffering, and permanently rendering plaintiff unable to earn a livelihood. Plaintiff avers said injuries to have been proximately caused by reason of the negligence of Charles Northington, a flagman in the service of defendant, who had charge of notifying trains following defendant's train No. 21 of the stationary presence of train No. 21 upon the main line of defendant, which negligence consisted in this: Said flagman negligently failed to set out said signal at a time when defendant's train No. 21 was stationary on defendant's main line at Verbena, in Chilton county, Alabama, and at a time when defendant's train No. second 13 was approaching said station from the rear of said train No. 21." Count 3: Same as count 1 down to and including the clause "to earn a livelihood," and continuing: "Plaintiff avers said injuries to have been proximately caused by reason of the negligence of Dick Jones, a person in the service or employment of the defendant, who had the charge or control of train No. 21 upon the track of defendant's railway, which negligence consisted in this: Said Jones negligently failed to have signals placed in the rear of train No. 21 at a time when said train was stationary upon the defend-

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ant's main line at Verbena, Chilton county, Alabama, and at a time when defendant's train No. second 13 was approaching said station from the rear of train No. 21 and on the same track with it."

The demurrers to the counts were as follows: "(1) Said complaint and each count thereof fails to show any causal connection between the negligence alleged and the injury complained of. (2) Said complaint and each count thereof fails to show any liability on the part of defendant for the injuries alleged to have been suffered by the plaintiff."

The minute entry recites 60 days were allowed from the day of the adjournment of the court within which to have bill of exceptions signed. There appears another order, as follows: "In the above-styled cause, tried at spring term, 1906, Chilton county circuit court, it is ordered that the time heretofore granted for defendant to present and have signed bill of exceptions in said cause is hereby extended for thirty days from the 22d day of July, 1906." This order is not dated.

There was judgment for plaintiff for \$5,000.

WILLIAM A. COLLIER, and GEORGE W. JONES, for appellant.—It appears without conflict that defendant was guilty of simple negligence as charged in the 1st and 3rd counts and that plaintiff was guilty of contributory negligence. The doctrine of comparative negligence does not exist in this state.—*Bir. Ry. L. & P. Co. v. Bynum*, 139 Ala. 390; *Southern Ry. Co. v. Arnold*, 114 Ala. 183; *Holland v. T. C. I. & R. R. Co.*, 91 Ala. 444. The other points discussed in brief arise out of assignments of error shown by the bill of exceptions, which was not considered by the court for reasons therein stated.

DENSON & DENSON, for appellee.—The court properly overruled the demurrers to the complaint.—*A. G. S. Ry. Co. v. Davis*, 119 Ala. 575; *M. J. & K. C. R. R. Co. v. Bromberg*, 141 Ala. 280; *L. & N. R. R. Co. v. Marbury Lbr. Co.*, 125 Ala. 237. The bill of exceptions cannot be considered for any purpose.—*Burns v. Gibbs*, 41

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South. 303; *Weems v. Weems*, 69 Ala. 105; *Southern Express Co. v. Black*, 54 Ala. 117.

SIMPSON, J.—This was an action for damages for personal injuries. The defendant was allowed 60 days from adjournment of court for having the bill of exceptions signed. The court adjourned May 24, 1906. The next order states that the time is "extended for thirty days from the 22d day of July, 1906," but the order is not dated, and there is nothing on the record to show when it was signed. Consequently we cannot say that the record affirmatively shows that the time was extended before the expiration of the time first granted. Consequently the bill of exceptions cannot be considered.

The demurrer to the first and third counts states that they show no "causal" connection between the negligence alleged and the injury, while the brief of counsel insists that said demurrer should have been sustained because the counts fails to show any "causal" connection. Taking it for granted that these are both misprints, and that the word intended was "causal," the court holds that, under the rules heretofore laid down by this court, said counts were not subject to said demurrer.—*A. G. S. R. R. Co. v. Davis*, 119 Ala. 572, 582, 24 South. 862; *Mobile, J. & K. C. R. R. Co. v. Bromberg*, 141 Ala. 280, 37 South. 396, 400.

There being no error, the judgment of the court is affirmed.

TYSON, C. J., and DOWDELL and DENSON, JJ., concur:

[Alabama Steel and Wire Company v. Griffin, Admr.],

## Alabama Steel and Wire Company v. Griffin, Admr.

*Action for Damages for Death of Employee.*

(Decided Feb. 5th, 1907. 42 So. Rep. 1034.)

1. *Appeal; Rulings on Pleadings; Harmless Error.*—Counsel for plaintiff having stated that plaintiff did not claim a recovery on any of the counts of the complaint, except certain specified ones, and the court in its charge to the jury having limited the right of recovery to the specified counts, the complaint was in effect amended by striking out the abandoned counts and rulings on demurrer to those counts, if error, was harmless.
2. *Master and Servant; Statutory Regulation; Railroad Employees.*—Subdivision 5 of section 1749, Code 1896, has application only to one employed in and about a railroad, and one seeking a recovery thereunder must allege and prove that at the time of the injury he was employed in and about a railway, and it is not sufficient that he was employed at the plant of an employer who also owned a railroad operated in furtherance of the business of the plant.
3. *Same; Injury to Servant; Complaint; Sufficiency.*—A complaint which alleges that the employer owned and operated a plant and a railroad and that plaintiff's intestate was killed by cars striking other cars while loading them in consequence of the negligence of an employee on the railroad states a cause of action under subdivision 5, section 1749, Code 1896.
4. *Appeal; Ruling on Demurrer; Review.*—On appeal, this court will not consider the sufficiency of the complaint on a ground not presented by the demurrer thereto.
5. *Master and Servant; Injury to Servant; Complaint; Sufficiency.*—A complaint alleging that the employer was operating a plant, and that while the plaintiff's intestate was engaged in and about the business of the employer at or near the plant, he was struck by cars operated on a railroad owned by the employer, does not state a cause of action under subdivision 5 of section 1749, Code 1896; it being wanting in averment that intestate was employed in or about the railway, or that he was discharging any duty in connection therewith.
6. *Name; Middle Initial.*—Letters of administration designating the intestate as "C. L. C.," are admissible in evidence, although

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intestate's correct name was "C. C.," the insertion of the middle initial being surplusage.

7. *Master and Servant; Injury to Servant; Negligence; Evidence.*—The counts on which the case was tried not alleging negligence in the failure to have a headlight on the engine, evidence of a want of the headlight was immaterial.
8. *Death; Evidence; Damages.*—It was permissible to show that plaintiff's intestate and another walked from another state to the place of employment, begged food and slept in barns, as shedding light upon whether or not intestate was a sober and industrious man, or an inebriate, a tramp or a lazy man, to go to the jury in determining intestate's earning capacity, and as shedding light on the question of damages.
9. *Measure of Damages; Evidence; Admissibility.*—It may be shown in an action for the negligent death of intestate that he was skilled in trades other than the one in which he was employed, and what he could earn at such trade, as shedding light on his probable earning capacity, unless he had permanently abandoned the same, or had become incapacitated from following it before his death.
10. *Appeal; Assignments of Error; Sufficiency.*—The portion of the judge's charge containing several hundred words and many sentences is set out in the bill of exceptions. The assignment of error does not point out particularly the defective portions, and counsel do not do so in brief. Held, the exception is unavailing unless all the portion set out is bad.
11. *Trial; Instructions; Applicability to Pleading.*—An instruction predicated upon a defect which was not alleged in either count of the complaint that went to the jury, was properly refused.
12. *Same; Misleading Instructions.*—A charge asserting that if the jury believed that intestate's parents did not know where he was getting the money they testified he sent to them, and if the jury did not believe that intestate was earning the money, in computing the measure of damages, they could not estimate the same as a basis, was misleading and properly refused.
13. *Death; Measure of Damages.*—Where the parents of the intestate were entitled to the damages awarded for his death, their life expectancy does not enter into the estimate of the damages.
14. *Same; Jurisdiction.*—Although intestate was a non-resident and had no property in this state at the time of his death, his administrator may recover for the negligent death in the courts of this state.
15. *Appeal; Instructions; Review.*—Instructions relating to counts open to demurrer, and so held on this appeal, will not be considered.

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16. *Master and Servant; Injury to Servant; Action; Instruction.*—An instruction asserting that if someone unknown to the other employes had thrown the switch and they were not aware that the switch had been thrown, a verdict should be rendered for defendant, was misleading and properly refused; as was an instruction asserting that if the person named in the complaint did not throw the switch, nor authorize the same to be thrown, and did not know that it was thrown so as to divert the cars on to the track where intestate was working, there could be no recovery.
17. *Trial; Instructions; Conformity to Issues.*—Where none of the counts submitted to the jury predicated negligence on signals given by one employe to another, an instruction based on the giving of signals was properly refused.
18. *Same; Instructions; Credibility of Witness.*—A charge asserting that if the jury believed that a witness had willfully sworn falsely to any material fact, they might, in their discretion, disregard his testimony is proper.
19. *Appeal; Exceptions to Instruction; Review.*—Although the bill of exceptions does not recite that the refused instructions was separately requested, yet if each charge shows that it was separately considered and marked refused, the ruling on each instruction is revisable.

APPEAL from Gadsden City Court.

Heard before Hon. JOHN H. DISQUE.

Action by J. H. Griffin, administrator of C. Cahill, deceased, against the Alabama Steel & Wire Company. From a judgment for plaintiff; defendant appeals. Reversed and remanded.

This cause, as appears from the opinion, was tried upon counts 5, 6, 9, and 11, which are as follows:

“(5) Plaintiff claims of the defendant the sum of twenty-five thousand dollars damages, for that heretofore, to-wit, the 18th day of February, 1904, the defendant was engaged in operating a plant at or near Gadsden, Ala., for the manufacture of pig iron and other material; that on said date, while plaintiff's intestate was in the service or employment of the defendant, a car or cars of the defendant ran upon or against plaintiff's intestate, injuring him, so that he died. And plaintiff says that his intestate's death was caused as aforesaid by reason and as a proximate consequence of

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the negligence of one J. N. Mitchell, a person in the service or employment of the defendant, and who had charge or control of a signal, switch, or points upon a railway or part of the track of a railway of the defendant, in this, viz.: Plaintiff's intestate was, while in the discharge of his duty as such employe, engaged in loading some cars for the defendant, which had been placed or were standing upon a switch, spur track, or siding of the defendant's railway to be loaded with ore or other material for use at the blast furnace of the defendant; and plaintiff says it was the duty of the said J. N. Mitchell, when advised by plaintiff's intestate, or others assisting in loading the cars, that the cars were ready to be moved or set out, to so set the switch or points upon the railway to let the engine, locomotive, or cars in or upon the switch or siding that the loaded cars might be moved; and the plaintiff says that the said Mitchell negligently set or arranged the switch or points so as to let in the engine and cars, and when he had not been advised to do so; and plaintiff says that by reason of the negligence of said J. N. Mitchell as aforesaid an engine and cars of the defendant were run in or upon the said side track, switch, or spur with great speed, and upon or against the plaintiff's intestate as aforesaid. Hence this suit."

(6) Same as fifth down to and including the words "viz.," where it first occurs in said fifth count, continuing: "Plaintiff's intestate was, while in the employ of defendant and while in the discharge of his duty as such employe, engaged in loading some cars for the defendant which were standing upon a switch, spur track, or siding at the time of the loading; and plaintiff says it was the duty of the said J. N. Mitchell to so set the switch or points on the track as to let in the engine, locomotive, or cars of the defendant for the purpose of moving out the loaded cars when advised or signaled to do so, and when the cars were loaded and ready to be moved; and plaintiff says that at the time his intestate received the injuries as aforesaid the said J. N. Mitchell negligently set the switch or points on the track, and by reason of such negligence the engine and some cars of the defendant were run at great speed upon said



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switch, spur track, or siding, and when no signal had been given for the engine or cars to come in, and at a time when they were not expected by plaintiff's intestate, inflicting the injuries as aforesaid. Hence this suit."

"(9) Plaintiff claims of the defendant the sum of twenty-five thousand dollars as damages, for that heretofore, to-wit, on the 18th day of February, 1904, the defendant was operating a plant at or near Gadsden, Ala., for the manufacture of pig iron and other materials; that on said day, and while plaintiff's intestate, the said Cahill, was in the service or employment of the defendant, and engaged in and about said business of the defendant at or near said plant, a car or cars ran upon or against said intestate, and so injured him that he died. And plaintiff avers that his intestate's death was caused in the manner aforesaid, by reason and as a proximate consequence of the negligence of a person in the service or employment of defendant who had charge or control of a locomotive engine upon a railway or part of the track of a railway of defendant, viz., defendant's engineer, Smith, of the locomotive engine, who caused said car or cars to move and run upon or against said intestate as aforesaid, negligently by means of said engine causing said cars or car to run against or upon said intestate as aforesaid."

"(11) Same as count 9, down to and including the words "that he died," where they first occur in said count 9, and continuing: "And plaintiff avers said car or cars ran upon or against said intestate, and his death was caused as aforesaid, by reason and as a proximate consequence of the negligence of a person in the service or employment of the defendant who had charge or control of a switch, signal, or points upon a railway or part of the track of a railway of the defendant, viz.: One Walter Mitchell negligently changed said switch, signal, or points, so that by reason thereof certain cars operated by the defendant were run upon the wrong track, and struck a car standing upon said last-mentioned track, and as a proximate consequence thereof one or more of said cars ran upon or against said intestate, and caused his death as aforesaid."

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Demurrers were interposed to these counts as follows:  
To the fifth count:

"Because it does not state a cause of action. It appears that the defendant is not liable for the alleged negligent act of Mitchell. It does not appear that Mitchell had superintendence intrusted to him by defendant. It does not give the name of the person in charge or control of the switch, signal points, etc. For that it does not appear that defendant was operating a railroad in the contemplation of the statute. It does appear that the signal, switch, points, etc., were not a part of such railroad as contemplated by the statute. It does not appear that the intestate was injured while aiding as a servant in the operating of such a railroad as contemplated by statute. For that it does not appear that intestate's duties required his presence on the railroad track. From aught that appears, intestate was wrongfully on the railroad track. For that it does not appear that said Mitchell knew that intestate was on the railroad track, or had any reason to believe he was on said track."

The same grounds are assigned to the sixth count of the complaint, and the same to the eleventh count of the complaint.

To the ninth count of the complaint, the same grounds as to the fifth count, with these additional grounds: "For that it does not appear that Smith had superintendence intrusted to him. For that it does not give the name of the person in charge or control of the engine or car. For that it is doubtful and uncertain under which subdivision or subsection of the statute said count is framed."

Objection was interposed to the introduction of the letters of administration, because issued upon the estate of C. L. Cahill, while the complaint charges that the intestate was C. Cahill. Objection was also interposed to testimony that the engine which ran back with the cars that injured intestate had no light on it, or on the cars it was pushing. The defendant sought to introduce evidence showing that intestate and Kirchner walked from Knoxville, Tenn., begged food, and slept in barns and under hayricks. This testimony was ex-

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cluded on motion of plaintiff. It was shown that the intestate was working for one dollar per day at the time of his death. The plaintiff sought to show, and the court permitted it, that the plaintiff was a stone cutter, and when working at his trade earned from four to six dollars per day. The evidence tended to show that the intestate was in the employment of the defendant loading or unloading some cars with ore, that the cars were on a siding or spur track used by defendant in the operation of its furnace and steel plant, and that it was near to a trestle or raised track, and that from the track of which was a part of this track several tracks branched off; that the rule was that an engine and cars coming back on either of these tracks were to give certain signals, or were to be signaled a certain way to come back on the tracks as a warning to those loading the cars to get out of the way. There was dispute as to whose duty it was to set the switch and to give the signals, and as to whether the switch was properly set, and there was testimony that the switch had been tampered with, or that some one not connected with defendant or in his employment had thrown the switch and left it set for the wrong track. There was dispute as to whether the defendant was guilty of contributory negligence in the way he was loading, and in the place he occupied on the cars while loading; there being, it was contended, a safe way and an unsafe way.

The following charges were requested by the defendant and refused by the court:

“(1) If the jury believe from the evidence in this case that C. Cahill was earning only \$31.20 per month, of which amount he was spending \$15 for board, \$10 for clothing, and \$5 per month for incidentals, you cannot find that he was contributing more than \$1.20 per month out of his said earnings to the support of his mother.

“(2) In estimating the damages in this case, if you believe the evidence, you cannot compute the damages on a basis of what the deceased could have earned as a stone cutter or granite cutter, if you are reasonably satisfied from the evidence that for a long time prior to

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his death, and at the time of his death, he had not worked and was not working at that trade.

"(3) If you believe from the evidence in this case that there was no defect as alleged in the plaintiff's complaint, and that A. M. Brown threw the switch, and that neither Smith, nor J. M. Mitchell, nor Walter Mitchell, knew or was aware that the switch had been thrown, and that, as soon as it was discovered that the switch had been thrown, every effort in good faith was made by said Smith and Mitchell to give warning of the approach of the cars and to stop the cars and engine to avoid injury to the deceased, you will find a verdict in favor of the defendant.

"(4) If you believe from the evidence in this case that the Cahills whose testimony has been read to you did not know where the deceased was getting the money they say he was sending home, and if you do not believe from the evidence in the case that the deceased was earning said money, you cannot estimate the same as a basis for computing the measure of damages in this case."

"(6) The proper measure of damages is not the aggregate amount of what C. Cahill was contributing to the support of his mother and father; but it is such sum as, with legal interest added, would aggregate that amount at the probable termination of the life of his mother and father.

"(7) The measure of damages in this case is such as, with legal interest, during the period of expectancy of the life of plaintiff's mother and father, would produce at its expiration a sum equal to the amount that would be contributed to said father or mother during said period."

"(11) If you believe, from the evidence in this case, that C. Cahill was a nonresident of the state of Alabama, and had no estate in the state of Alabama at the time of his death, plaintiff cannot recover."

"(17) If you believe the evidence in this case, you cannot find a verdict in favor of plaintiff under the count in the complaint which alleges the negligence of Walter Mitchell.

"(18) If you believe, from the evidence in this case, that some one unknown to Z. Smith and J. N. Mitchell

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threw the switch which leads from the trestle track to the coal track, and that neither said Smith nor said Mitchell was aware that said switch had been thrown, so as to divert the cars from said trestle track to said coal track, you will find a verdict in favor of the defendant."

"(23) If you believe, from the evidence in this case, that J. N. Mitchell did not throw said switch, nor authorize the same to be thrown, nor knew that the same was thrown, so as to divert the engine and cars onto the coal track where plaintiff's intestate was working, plaintiff cannot recover under the counts in the complaint claiming damages by reason of the negligence of said Mitchell.

"(24 It is immaterial in this case whether J. N. Mitchell gave to Engineer Smith a high ball or a go-ahead signal, if you believe, from the evidence in this case, that Smith understood the signal to mean that he should propel the cars up to the trestle track, and if you believe, from the evidence in this case, that J. N. Mitchell, by giving such signal, intended to signal the engineer to propel the cars up the trestle track."

"(27) If you believe the evidence in this case, plaintiff cannot recover damages beyond the life expectancy of the father and mother of the deceased."

(31) Affirmative charge as to fifth count.

(32) Affirmative charge as to sixth count.

(35) Same as to the ninth count.

"(36) If you believe, from the evidence in this case, that the witness Brown has willfully and corruptly sworn falsely as to any material fact in this case, you may in your discretion disregard his testimony entirely."

There was jury, and verdict for plaintiff for \$11,500.

BURNETT, HOOD & MURPHY, for appellant.—The demurrer to the 5th count of the complaint should have been sustained.—Dresser on Employer's Liability, §§ 73 and 80; *Whatley v. Zenida Coal Co.*, 122 Ala. 118; *H. A. & B. Ry. Co. v. Dusenberry*, 94 Ala. 416. On the same authorities the demurrer should have been sustained to the 6th count. The demurrers to the 9th

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count should have been sustained.—*Mobley's Case*, 139 Ala. 425; *Lamb's Case*, 124 Ala. 172; *William's Case*, 140 Ala. 230; *Ga. Pac. Ry. Co. v. Propst*, 85 Ala. 205; *Southern Ry. Co. v. Guyton*, 122 Ala. 240. Subsection 5 does not protect those employes not actually engaged in railroad work.—*Indianapolis Union Ry. Co. v. Hau-lihan*, 157 Ind. 494; *Deppe v. Chicago R. I. & P. R. Co.*, 36 Iowa, 52; *Lavallee v. St. Paul M. & M. R. R. Co.*, 40 Minn. 249; *Nichols v. Walter*, 37 Minn. 264; *State v. Smith*, 58 Minn. 35; *Johnson v. St. Paul & D. R. Co.*, 8 L. R. A. 419; *Ballard v. Mississippi Cotton Oil Co.*, 34 So. 533; *L. & N. R. Co. v. Morris*, 65 Ala. 200; *Youngblood v. Birmingham T. & S. Co.*, 95 Ala. 524; *Smith v. L. & N. R. Co.*, 75 Ala. 449; *Brown v. A. G. S. R. Co.*, 87 Ala. 370; *Randolph v. Builders P. & S. Co.*, 106 Ala. 510; *Kentz v. Mobile*, 24 So. 952; *Cooley's Constitutional Limitations*, (5 Ed.) pp. 483-484; *Wally v. Kennedy*, 2 Yerger, 554; *Holden v. James*, 6 Am. Dec. 174; *Missouri v. Seivis*, 101 U. S. 22; *Minneapolis Ry. Co. v. Beckwith*, 129 U. S. 26; *L. & N. R. Co. v. Railroad Commission*, 19 Fed. 679; *State v. Goodwill*, 25 Am. St. Rep. 863; *Barbier v. Connolly*, 113 U. S. 27.

The court erred in admitting the letters of administration.—*Gerrish v. The State*, 53 Ala. 476; *Diggs v. The State*, 49 Ala. 309; *O'Brien v. The State*, 91 Ala. 25; *Johnson v. Wilson*, 137 Ala. 468; *United States v. Upham*, 43 Fed. 68. The court erred in permitting evidence of the wages received by deceased as a stone cutter in Massachusetts.—*Storay v. Union Bank*, 34 Ala. 687; *People v. Augsberry*, 97 N. Y. 501. The court erred as to damages recoverable in this action.—*Ala. Min. R. R. Co. v. Jones*, 114 Ala. 519; *James v. R. & D. R. R. Co.*, 92 Ala. 231; *L. & N. R. R. Co. v. Jones*, 130 Ala. 456. Counsel discuss other assignments of error but cite no authority.

BOYKIN & BRINDLEY, and GOODHUE & BLACKWOOD, for appellee.—The allegations and statements of counts 5, 6, 9 and 11 are sufficient and not subject to the demurrers interposed thereto.—*Seaboard Mfg. Co. v. Wilson*, 94 Ala. 132; *U. S. Rolling Stock Co. v. Weir*, 96 Ala. 397; *K. C. M. & B. R. R. Co. v. Burton*, 97 Ala. 240;

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*Mary Lee C. & Ry. Co. v. Chambliss*, 97 Ala. 171; *G. P. Ry. Co. v. Davis*, 92 Ala. 300. The count drawn under subdivision 5 did not need to allege that the person in charge or control of the signals, points, etc., was at the time in the discharge of his duties as an employe of defendant on or about a railroad.—*Woodward Iron Co. v. Henderson*, 21 South. 430; *State of Iowa v. McCombs*, 18 Ia. 50; *Sewall v. The State*, 82 Ala. 57; *Schee v. LeGrange*, 78 Ia. 101; *Fannin v. Kraff*, 68 Ia. 244. The court properly admitted the letters of administration.—*Edmundson v. The State*, 17 Ala. 179; *Pace v. The State*, 69 Ala. 231; *Rooks v. The State*, 83 Ala. 80. The court did not err on its rulings on Butler's testimony.—21 A. & E. Ency. of Law, p. 517, and authorities there cited; *L. & N. R. R. Co. v. Persons*, 97 Ala. 211. The court did not err in admitting evidence as to the former occupation and wages of deceased nor as to what deceased earned two or more years before his death.—*Christian v. Columbus Ry. Co.*, 90 Ga. 124; *Richmond etc. Ry. Co. v. Hammond*, 93 Ala. 181; *Louisville, etc. Ry. Co. v. Graham*, 98 Ky. 688; *McAdory v. Louisville & Nashville R. Co.*, 94 Ala. 272; *James v. R. & D. R. R. Co.*, 92 Ala. 231; *L. & N. R. R. Co. v. Orr*, 91 Ala. 548; *District of Columbia v. Woodbury*, 136 U. S. 450; Amr. & Eng. Ency. Lay, Vol. 8, p. 944, and note 2, bottom of page.

The court's oral charge was correct as to the measure of damages.—*Trammell v. L. & N. R. R. Co.*, 93 Ala. 350; *R. & D. R. R. Co. v. Weems*, 97 Ala. 202.

ANDERSON, J.—In the opening argument counsel for the plaintiff stated to the court and jury that plaintiff did not claim a recovery in the case on any count of the complaint except the fifth, sixth, ninth, and eleventh; and the court, in the oral charge to the jury, limited plaintiff's right to recovery upon these counts and these alone. This was in effect an amendment of the complaint by striking out all the other counts, and, if there was any error upon the pleading in reference to said abandoned counts, it was error without injury, and we will only consider the rulings on the pleadings

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which apply to counts 5, 6, 9 and 11.—*Sou. Ry. Co. v. Bunt*, 131 Ala. 591, 32 South. 507; *Woodward Iron Co. v. Andrews*, 114 Ala. 243, 21 South. 440. These views are not in conflict with what was held in the case of *A. G. S. R. R. v. Burgess*, 114 Ala. 587, 22 South. 169. There it was held that a withdrawal of the counts should appear of record, and not left only to be shown by bill of exceptions, and that said counts and the rulings thereon are legally before the court for review. They may be legally before the court for review, but, where it is shown affirmatively by the bill of exceptions that these counts were abandoned by plaintiff and charged out by the trial court, although they may be before us, we are fully warranted by the force of reason and authority in holding that any erroneous rulings relating to said counts, was error without injury.

The counts upon which the case was tried (5, 6, 9, and 11) were evidently intended to come within the purview of subdivision 5 of the employer's liability act (section 1749, Code 1896), which reads as follows: "When such injury is caused by reason of the negligence of any person in the service or employment of the master or employer, who has charge or control of any signal, points, locomotive, engine, switch, car or train upon a railway or of any part of the track of a railway." Mr. Dresser, in his excellent work on Employer's Liability Act (section 73, p. 322), says: "The employer's liability acts of England, Alabama, Massachusetts, Colorado, and Indiana have likewise favored the employes of railroads above those engaged in other occupations by inserting a clause designed exclusively for their benefit. The purpose of this enactment is more effectually to protect employes of railroads from the peculiar dangers of that business. It applies only to railroad employes, and whether or not a case comes within its terms depends, first, upon the question whether it is an injury received in operating a railroad, as that word was understood by the framers of the act." This court has held that subdivision 5 relates only to engines and cars on a railway.—*Whatley, Adm'r v. Zenida Coal Co.*, 122 Ala. 118, 26 South. 124. For whose benefit was this subdivision enacted? This question has



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never before been answered by this court, but has been settled in other states, and by the Supreme Court of the United States, in passing upon statutes not identical with, but enacted for the same practical purpose as, ours. It was there held that this law was enacted for the protection of those engaged in the hazardous character of business of operating a railroad.—*Mo. R. R. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107; *Mo. Pa. R. R. v. Humes*, 115 U. S. 512, 6 Sup. Ct. 110, 29 L. Ed. 463; *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923. The Supreme Court of Iowa, in the case of *Foley v. Chicago R. I. & P. R. R.*, 64 Iowa, 644, 21 N. W. 124, says: "The manifest purpose of the statute was to give its benefits to employes engaged in the hazardous business of operating railroads. When thus limited, it is constitutional. When extended further, it becomes unconstitutional." See, also, *Ind. Union R. R. Co. v. Houlihan*, 157 Ind. 494, 60 N. E. 943, 54 L. R. A. 787; *Deppe v. Chicago R. R.*, 36 Iowa, 52; *Lavallee v. St. Paul R. R.*, 40 Minn. 249, 41 N. W. 974; *Nichols v. Walter*, 37 Minn. 264, 33 N. W. 800.

Mr. Reno, in his work on Employer's Liability Act (section 69), says: "As applied to railroad companies, the defense of fellow service has been much further restricted by the employer's liability acts than as applied to other employers. As we have seen, other employers are made liable for the negligence of their superintendents. Railroad companies are not only made liable by the Massachusetts act for a superintendent's negligence, but also for the 'negligence of any person in the service of the employer who has the charge or control of any signal, switch, locomotive engine, or train upon a railroad.' The English and Colorado statutes are to the same effect, though the English act uses the word 'points' instead of 'switch.' The Alabama act goes still further in this direction, and makes a railroad company liable for 'the negligence of any person in the service of the master or employer who has charge or control of any signal, points, locomotive engine, switch, car, or train upon a railway, or of any part of the track of a railway." While it is to be observed that the Alabama act goes further than any other, and especially further

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than those heretofore construed, we cannot for a moment conceive the idea that it was intended to embrace any employes except those employed in and about a railroad. *Ex vi termini*, in order for the plaintiff to recover under said subdivision, the pleading and proof must show that at the time he was injured he was employed in and about the railroad. It is not sufficient that he was employed at a plant by the same master, who also owned and controlled a railroad, which may be operated in furtherance of the business of the plant. His duties must be in and about the railroad. Counts 5 and 6, while averring that defendant owned and operated a plant, also averred that it was operating a railroad, and that the intestate was killed by cars on the track on defendant's railway "while in discharge of his duties as such employe, engaged in loading some cars for the defendant, which had been placed or were standing upon a switch, spur track," etc., and sufficiently bring the parties within the terms of subdivision 5.

Counsel for appellant contend, in brief, that the fifth count is bad because it avers the duties of Mitchell in the alternative, and that it falls within the influence of the case of *H. A. & B. R. R. Co. v. Dusenberry*, 94 Ala. 413, 10 South. 274. Whether it does or not we need not determine, as the question is not presented by any grounds of the demurrer to the complaint.

Counts 9 and 11 aver that the defendant was operating a plant; "that while the intestate was in the service and employment of the defendant, and engaged in and about the business of the defendant at or near said plant, \* \* \* he was run upon or against. \* \* \*." There is no averment in either of said counts 9 and 11 that would even indicate that the intestate was employed in or about the railway, or that he was discharging any duty in connection with a railway. He may have been working in or about the plant, and yet may have been in no way connected with the railway at the time he was killed, so as to bring him within the influence of subdivision 5 of the statute. The trial court erred in not sustaining the demurrers to counts 9 and 11. The case of *Ala. G. S. R. R. Co. v. Davis*, 119 Ala. 572, 24 South. 862, cannot save these counts. The court, af-

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ter some criticism, upheld the counts in said case, which are more definite than the two now under consideration. There the only business engaged in by the defendant, as was averred, was operating a railroad, and that the plaintiff was at the time an employe of the defendant. Here we have an averment that the defendant was operating a plant, and that the intestate was employed and engaged in and about said business at or near said plant. What business? There certainly is no averment that he was employed in or about a railroad.

There was no merit in the objection to the letters of administration, because the deceased was called "C. L. Cahill," instead of "C. Cahill." The insertion of the middle letter makes no difference, and it could be disregarded.—*Edmundson v. State*, 17 Ala. 179; 52 Am. Dec. 169; 21 Am. & Eng. Ency. of Law, p. 307.

Evidence as to whether or not the engine had a light on it was not material to the issues involved in the counts submitted to the jury; but whether relevant under the counts that were subsequently charged out we need not decide as the case must be reversed on other questions.

The defendant had a right to show that plaintiff's intestate was not a man of industry and thrift—that he was an inebriate, a tramp, or a lazy and indolent man—as affecting his habits of industry and earning capacity.

All of the other exceptions to the evidence relate to the measure of damages in cases of this character, which has been so repeatedly established by this court that we feel that a mere reference to some of the authorities will suffice.—*Ala. Min. R. R. Co. v. Jones*, 114 Ala. 519, 21 South. 507, 62 Am. St. Rep. 121; *James v. R. & D. R. R. Co.*, 92 Ala. 231, 9 South. 335; *L. & N. R. R. Co. v. Jones*, 130 Ala. 456, 30 South. 586. We can discover nothing in the evidence objected to violative of the rule, or that should receive any special notice by us, except, perhaps, to determine whether or not the plaintiff was confined in his proof to the probable earnings of intestate in the trade or calling in which he was engaged,

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and as to what his services were worth in Alabama, and at the time of his death. We do not think the plaintiff would be prohibited from showing that the intestate was skilled in trades other than the one in which he was engaged at the time of his death, or of showing what he could earn in Alabama, or elsewhere, at such other trade or trades, unless he had permanently abandoned such other trades or callings, or had become incapacitated from following such trades previous to his death.—*Seaboard Mfg. Co. v. Woodson*, 98 Ala. 378, 11 South. 733; *Rayburn v. Central Iowa R. R. Co.*, 74 Iowa, 643, 35 N. W. 606, 38 N. W. 520; *Grimmelman v. Union Pac. Co.*, 101 Iowa, 74, 70 N. W. 90.

We find an exception to a certain portion of the court's oral charge, and which, as set forth, contains about 300 words, and many sentences, covering nearly an entire page of the transcript. There is nothing in the exception which attempts to point out the defective portions, if any exist, nor in the assignment of error or brief of counsel. The exception cannot avail the appellant, unless all that portion of the court's charge excepted to was bad. Such is not the case, at most, if not all, of it, is correct.—*Simpson v. State*, 111 Ala. 6, 20 South. 572.

Charges 1 and 2, requested by the defendant, were properly refused, and are fully discussed in what we said as to evidence relating to the measure of damages.

Charge 3, requested by the defendant, was properly refused. If not otherwise bad, it is predicated upon a defect which was not charged in either of the counts that went to the jury.

Charge 4 was properly refused. If not otherwise bad, it was misleading.

Charges 6 and 7, requested by the defendant, were properly refused. We do not understand that the life expectancy of the parents of the intestate has anything to do with the measure of damages.

Charge 11, requested by the defendant, was properly refused.—*Reiter-Connally Co. v. Hamlin*, 144 Ala. 192, 40 South. 280.

Charge 17 need not be discussed by us, as it relates to count 11, to which we hold the demurrer should have been sustained.

Charge 18 was properly refused. There was a count charging the negligence to Walter Mitchell, and, if he left the switch open, the plaintiff could recover, whether J. N. Mitchell or Zimri Smith left the switch open, or knew who did leave it open.

Charge 23, requested by the defendant, should have been given.

Charge 24, requested by the defendant, was properly refused. None of the counts submitted to the jury predicated the negligence complained of upon any signal given by J. N. Mitchell to Smith.

Charge 27, requested by the defendant, was properly refused.

Charges 31 and 32, requested by the defendant, were properly refused as there was evidence in support of counts 5 and 6.

Charge 35, requested by defendant, need not be considered, as we hold that the demurrer should have been sustained to the ninth count.

Charge 36, requested by the defendant, should have been given.—*McOlellan v. State*, 117 Ala. 140, 23 South. 653.

Appellee's counsel insist that these charges come within the influence of the rule laid down in *Verberg v. State*, 137 Ala. 73, 34 South. 848, 97 Am. St. Rep. 17, and *Sou. Ry. Co. v. Douglass*, 144 Ala. 351, 39 South. 268. It is true the bill of exceptions does not recite that they were separately asked; but each charge shows that it was separately considered, and marked "Refused," by the court.

The judgment of the city court is reversed, and the cause is remanded.

Reversed and remanded.

TYSON, C. J., and DOWDELL and SIMPSON, JJ., concur.

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**Southern Ry. Co. v. McGowan.***Action for Damages for Injury to Employee.*

(Decided March 2, 1907. 43 So. Rep. 478.)

1. *Master and Servant; Injury to Servant; Action; Jury Question.*—It was a question for the jury to determine whether the handle of a car broke from its insufficiency to perform the service for which it was used or from a latent defect unknown to the master.
2. *Same.*—If the jury find that the breaking of the handle of a car was due to its insufficiency to perform the service, for which it is used, it is still a question for them to determine under the evidence whether the insufficiency of the handle was known to the defendant so that he assumed the risk.
3. *Action; Complaint; Single Cause.*—A count ascribing the injuries of plaintiff to the negligence of the defendant's superintendent in failing to keep the handle of the hand car in proper order and negligently permitting plaintiff to use it while in a defective condition is not subject to demurrer as setting up two separate causes of action.
4. *Master and Servant; Injury to Servant; Complaint.*—The count was not subject to demurrer for failing to show that the superintendent knew, or was negligent in not knowing of the defective condition of the appliance used, or for not showing that the alleged defective condition of the appliances used arose from defendant's negligence, or that it did not show that the car was in a defective condition.
5. *Same; Pleading; Contributory Negligence.*—A plea of contributory negligence for failing to choose a safe place in which to work but which does not allege that a safe place was known or apparent to plaintiff, was bad on demurrer.
6. *Same; Assumption of Risk.*—A plea of assumption of risk asserting that plaintiff was aware of the defect, that the defect was obvious and that if plaintiff remained in defendant's service without requesting the defendant to repair the same he assumed the risk, but failed to state that plaintiff knew or appreciated the risk arising from such defect, was bad on demurrer.
7. *Same; Knowledge of Defects by Master.*—If the master knows of the defect in his machinery, a servant does not assume

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the risk connected therewith by failing to give the master notice of the same, although he may not know that the master knew of the defect.

8. *Same; Evidence; Admissibility.*—It was competent to permit plaintiff to prove that handles made of other wood could as easily have been put in as the one used since the failure of the defendant to get a better handle than the one used when it was as convenient to do so was a circumstance to be considered by the jury.
9. *Same; Evidence; Rules of Work.*—Where the plaintiff was injured by falling from a hand car while riding backward, and there was conflict in the evidence as to the existence of a rule forbidding employees to ride backward while working it was competent to show that others had been riding backward as tending to show non-existence of the rule.
10. *Appeal; Review; Presumption.*—Where the bill of exceptions shows that leave was granted plaintiff to amend his complaint so as to claim damages for a rupture, though the record does not show that the pleadings were in fact so amended, it will be presumed that the amendment was made to sustain the action of the trial court in admitting evidence on this point.
11. *Evidence; Admissibility; Conclusion.*—Where plaintiff was injured by falling from a hand car while riding backward the court properly sustained an objection to the question whether or not he would have been injured had he occupied some other position, since the answer would have been a mere conclusion.
12. *Master and Servant; Injuries to Servant; Instructions.*—The plaintiff was injured by falling from a hand car while riding backward, and the court instructed the jury that if it was not more dangerous for plaintiff to occupy the position he was occupying when he fell, except by reason of defendant's negligence or a defect in the handle of the car, then the fact that he did occupy that position would not bar a recovery unless the plaintiff knew of the danger. Held, proper.
13. *Same; Duty of Master; Jury Question.*—The court properly charged the jury that it was for them to determine whether the defendant was negligent in failing to remedy the defect in the handle of the car.
14. *Same; Assumption of Risk.*—An employe assumes only the risks incident to his employment and is not bound to give the master notice of defective appliances where the master knew of such defect.
15. *Damages; Personal Injury.*—In an action for personal injury the plaintiff, if entitled to recover at all, can recover such damages as a jury think proper under the evidence not to exceed the amount claimed.

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16. *Master and Servant; Injury to Servant; Instructions; Contributory Negligence.*—The court properly instructed the jury that if plaintiff could reasonably have used a less dangerous way of working the car, this would not bar his right of recovery, unless it appeared that he knew he was using the more dangerous way and that such use was negligent and that this negligence was the proximate cause of his injury.
17. *Same; Duty of Master.*—The court properly charged that it was the duty of defendant to use reasonable prudence in selecting a handle for the car and that plaintiff had the right to assume that the handle furnished was reasonable safe, unless he knew it was not, and he was under no duty to examine the handle.
18. *Same; Instructions, General.*—The court properly instructed the jury that if the defective condition of the handle of the car was due to the negligence of the defendant and defendant negligently omitted to remedy the same the jury should find for the plaintiff, unless plaintiff own negligence contributed to his injuries.
19. *Same.*—The court properly refused to instruct the jury that the plaintiff could not recover if he knew the kind of wood used and its weakness, whether he knew it was dangerous to use such handle or not.
20. *Same.*—A charge asserting that there was no implied warranty on the part of the master that the tools or appliances furnished a servant were sound and fit for use was properly refused.
21. *Trial; Instructions; Proximate Cause.*—A charge is invasive of the province of the jury which asserts that the jury could not find that the defect in the handle was the proximate cause of the injury.
22. *Same; Assumption of Risk.*—Since the knowledge of the defect may not have apprised the plaintiff that it was dangerous to use the handle the court properly refused to instruct the jury that if the conditions of the handle was open to ordinary observation plaintiff could not recover.
23. *Same; Misleading Instructions.*—A charge asserting that the defendant is not bound to see that the handle of the car was free from such defect was properly refused, as tending to mislead the jury to conclude that there was no duty upon defendant to see that the handle was not defective although its defective condition may have been apparent in the examination.
24. *Master and Servant; Injury to Servant; Action; Instructions.*—Where the complaint alleged that the handle of the car was weak and insufficient, that it was made of cedar, that it was



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split, that it was hollow, and that it was unsafe, the court improperly instructed the jury that the plaintiff could not recover if it was shown that the handle was insufficient and weak, as the charge relieved the plaintiff of proving other defects particularized and averred.

**APEAL from Jackson Circuit Court.**

**Heard before Hon. W. W. HARALSON.**

Action by John McGowan against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded on rehearing.

This cause was tried on the amended second count, which is as follows: "Plaintiff claims of the defendant, the Southern Railway Company, a corporation, the sum of \$1,990 as damages for the injury inflicted upon plaintiff, as stated in this complaint, for that, at the time plaintiff was injured, defendant was operating a railroad in this county, and plaintiff at said time was an employe in the service of the defendant in the said business; that plaintiff, in the performance of his duties as such employe, was assisting in propelling a hand car on defendant's railroad on or about the 25th of February, near Facklers, in Jackson county; that while so engaged the handle of said hand car broke and caused plaintiff to fall in front of said hand car, and that after falling said hand car ran upon him and dragged him some six or eight feet, breaking one of his ribs, and mashing and bruising and injuring his leg, hip, and thigh, causing him great mental and physical pain and suffering, and also causing him to employ at great expense a physician for the treatment, and to expend large sums of money for medicine, and to lose his time from labor since this occurrence, and by permanently in a measure disabling him from work. And plaintiff avers that the handle of said car was weak and unsafe for service, and plaintiff avers that his injuries were caused by reason of the negligence of Henry Farmer, who was in the service or employment of the defendant, and who had, under his said employment, the superintendence of said car and the use thereof, and also superintendence of plaintiff, and that whilst in the exercise of such superintendence the said Henry Farmer negligently failed

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to keep the handle of said car in proper order and condition for use in defendant's service, and negligently allowed the use of said car by plaintiff in defendant's service in the said defective condition, to plaintiff's damages aforesaid."

Demurrer was interposed to this count: "Because it joins in one count two separate and distinct causes of action, arising under section 1749 of the Code of 1896 known as the 'Employer's Liability Act.' (2) It does not show that said Henry Farmer knew, or was negligent in not knowing, that said handle of said car was in a defective condition. (3) It does not show that said defective condition arose from, or had not been discovered or remedied owing to, defendant's negligence or the negligence of its agent intrusted with the duty of seeing that the same was in proper condition. (4) Because it does not show that said car was in a defective condition. (5) Because it does not show that said Farmer knew that said car was in a defective condition. (6) Because it does not show wherein said Farmer is negligent."

To this count, after demurrer overruled, the defendant filed pleas C and D, among others, which are as follows: "(C) Plaintiff proximately contributed to the injury and damage complained of by his own negligence, in this: He was holding said lever near the end, and was in front with his back turned in the direction the hand car was going, although there was plenty of room on the inside of the handle, which was a safer place for him to occupy, than that which he did assume, and, had he taken such position, he could not have been injured as alleged. (D) Plaintiff, when said injury occurred, was riding in said car in front of handle, with his back turned in the direction the car was going, and had hold of said handle near the end; whereas, there was a safer position he could have occupied in the discharge of his duties, namely, on the inside of or behind said handle, and fronting the way said car was going, and it was his duty to occupy said last-named position, and by his failure to do so he proximately contributed to the damage and injuries complained of."

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Demurrers were interposed to C as follows: "(1) It does not show that plaintiff knew of the safer place. (2) It does not show that plaintiff was negligent in occupying the position alleged in said plea, and holding the handle as alleged." And to plea D: "It does not show that plaintiff knew of said alleged safer position, and it fails to show any negligence on the part of the plaintiff."

Plaintiff filed pleas 4, F, and G, as follows: Plea 4: "Plaintiff, after becoming aware of the existence of said defect, remained in defendant's service without notifying defendant thereof or requesting defendant to repair the same." Plea F: "Plaintiff had been working on said hand car for about two months, and knew the condition of said handle, and with such knowledge continued to use such handle without objection or request that the same be repaired." Plea G: "The condition of said handle is obvious, and, if it was in a defective condition, plaintiff assumed the risk attendant upon its use by him."

Demurrers were interposed to these pleas as follows: To plea 4: "For that said plea fails to show that plaintiff's act in remaining in defendant's service as alleged was a negligent act. (2) Said plea fails to show any act of negligence by plaintiff. (3) For aught that appears from said plea, defendant knew of said defects." To plea F: "(1) It does not show there was any obvious danger in using the handle. (2) It does not show that plaintiff knew of any danger in using said handle. (3) It does not show any act of negligence on plaintiff's part in using said handle." To plea G: "Because it does not show that plaintiff acted negligently in using said handle. (2) It does not show that plaintiff had knowledge of any danger in using said handle. (3) It is not alleged that there was obvious danger."

The plaintiff filed a replication to plea 3 as follows: "That the defendant already knew of said defects." Demurrers were interposed to this replication: "For that it does not appear therefrom that plaintiff was aware that defendant knew of said defects; and for that it is a departure from the first count of the complaint." These demurrers being overruled, the defendant re-

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joined, and said that plaintiff remained in the service or employment of defendant for an unreasonable time after he became aware that defendant knew of said defect and after defendant had failed to repair the same. Demurrers were interposed to rejoinder as follows: "For aught shown by the rejoinder, the plaintiff continued in defendant's service at defendant's instance. Said rejoinder is irrelevant to any issue raised as to any matter previously pleaded. The fact, if it be a fact, that plaintiff remained in the service of defendant, is no answer to discharge defendant of negligence."

The facts are sufficiently stated in the opinion.

In his oral charge to the jury the court said: "If it was not more dangerous for plaintiff to occupy the position he was occupying when he fell, except by reason of defendant's negligence or a defect in the handle of the car, then the fact that he did occupy that position would not bar a recovery, unless you should find that the plaintiff knew the position he was occupying when he fell was more dangerous than the one he left. Whether the defendant was negligent, as is charged in the complaint, or whether there was a defect in the handle, or whether such defect or negligence made the position occupied by the plaintiff when he was hurt more dangerous, you must determine from the evidence." And: "The employe, or the plaintiff in this case, would assume ordinarily the risk only of such dangers as are incident to his employment." And: "If the section foreman knew of the defect, if there was a defect, and if the plaintiff also knew of it, he was not bound to give any notice of it." And: "It is not necessary for plaintiff to prove that the hollow or split in the handle was the cause of the injury. It is simply necessary to show that the handle was an unsafe timber to operate the car with; that is, you must be reasonably satisfied from the evidence that it was unsafe for the service." And: "It is not necessary to a recovery under the first count to prove that all the defects named therein caused the injury." And: "If you find that plaintiff is entitled to recover, then he is entitled to recover such an amount as under the evidence, you think proper—such an amount as you in your discretion see fit—not exceeding the amount

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claimed in the complaint." And in this connection the court said, if plaintiff was entitled to recover, he should have reasonable compensation for pain and suffering and loss of time and physical injury sustained by him, caused by defendant's negligence, and that the amount of damages lay in the discretion of the jury, which should not be more than fair and reasonable compensation for plaintiff's sufferings and injuries. Exceptions were reserved to all these portions of the court's oral charge.

At plaintiff's request the court gave the following written charges: "(1) The court charges the jury that, if it appears from the evidence that plaintiff could reasonably have used a less dangerous way to work the handle of the lever of the car, this will not of itself bar his recovery. It must further reasonably appear from the evidence that the plaintiff knew he was using a more dangerous way, that such use of a more dangerous way was negligence, and that this negligence was the proximate cause of his injuries. (2) The court charges the jury that it was the duty of the defendant to be reasonably prudent and cautious in selecting a handle for the lever of the car, and that when the handle was put in the lever, if plaintiff then and thereafter used it in his duties under his employment, then plaintiff, in using the handle, had the right to assume it was reasonably safe for service, unless he knew it was not so. (3) The court charges the jury that the plaintiff was under no duty to examine the handle to see if it was all right; but he had the right in law to assume it was fit for service, and could act upon this assumption in using it, unless he knew it was not safe for service. (4) The court charges the jury that if they are reasonably satisfied from the evidence that the plaintiff's injuries were caused by reason of the defective condition of the handle of the lever of the car, in that said handle was weak and insufficient for the service, and that it was made of cedar, and if the jury are further reasonably satisfied from the evidence that this defective condition had not been remedied, owing to the negligence of the defendant, and that defendant knew of such defect, in a time rea-

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sonably sufficient to remedy the same, then they must find for the plaintiff, unless the evidence reasonably shows to the jury that the plaintiff's injuries were the result of his negligence and that his negligence proximately contributed to his injuries." The defendant requested the court in writing to give the following charges, which were refused: Charges 1, 2 and 3 were the affirmative charges as to the various counts of the complaint. Other charges: "(4) If you believe from the evidence that the handle was weak, and that its weakness is due to the fact that it was made of cedar, and that the plaintiff, several months before the injury, knew that it was made of cedar, and continued to work with it up to the time of the injury without making any objection to using it, he cannot recover in this case. (5) There is no implied warranty on the part of the master or employer that the tools and appliances furnished his servant are sound and fit for the purpose intended. (6) You cannot find from the evidence in this case that the hollow and split in the piece of handle offered in evidence was the proximate cause of the injury. (7) If the condition of the handle was open to ordinary observation, plaintiff cannot recover in this case; nor can he recover, if its condition was not open to ordinary observation, unless its defective condition was known to defendant or Farmer, or could have been discovered by them by the use of reasonable and ordinary care, and they failed to use such care. (8) Although plaintiff is not bound or required to inspect or examine the handle, yet if the fact that it was made of cedar and that it was hollow or split was open to ordinary observation, plaintiff assumed the risk of any injury caused thereby. (9) The defendant was not bound to see that the handle of said car was free from defect or the best in use, and is not chargeable as an insurer of its safety. (10) If you believe from the evidence that the danger, if any, from the use of the handle, was not open to ordinary observation and could not be discovered by Farmer any more readily than by plaintiff, plaintiff cannot recover therefor. (11) If you believe from the evidence that plaintiff's injuries were caused by reason of the weakness of the handle, and that such weakness arose solely from

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the fact that the handle was made of cedar, then the plaintiff cannot recover. (12) There is no evidence in this case that the split and hollow in the piece of handle produced before the jury was the proximate cause of the injury."

It is unnecessary to set out the other charges.

HUMES & SPEAKE, for appellant.—The court erred in sustaining demurrers to plea 4.—§ 3303, Code 1896; 112 Ala. 465; *Goins v. Ala. S. & W. Co.*, 141 Ala. 537; *K. C. M. & B. R. R. Co. v. Thornhill*, 141 Ala. 215. The plea was not subject to any of the demurrers interposed to it and, hence, no infirmity is pointed out.—*Milligan v. Pollard*, 112 Ala. 465. The master was not liable if the servant knew of the defect and remained in the service after the lapse of a reasonable time for the defect to be remedied or removed.—*Stutt's Case*, 105 Ala.; *L. & N. R. R. Co. v. Boland*, 96 Ala. 626; *G. P. R. R. Co. v. Davis*, 92 Ala. 300; *C. & W. R. R. Co. v. Bradford*, 86 Ala. 574; *Goins v. A. S. & W. Co.*, *supra*. If the defect is obvious or suggestive of danger knowledge on the part of the servant would be presumed.—*Sloss, etc., Co. v. Knowles*, 129 Ala. 410; *Sloss Co. v. Mobley*, 139 Ala. 425; *B. R. & E. Co. v. Allen*, 99 Ala. 359. On the authorities above cited pleas F and G were not subject to demurrer. The demurrer to the replication to plea 3 should have been sustained. The replication instituted a departure from the complaint.—*National Bank v. Nelson*, 139 Ala. 578; *George v. M. & O. R. R. Co.*, 94 Ala. 245; *Bridges v. T. C. I. & Co.*, 109 Ala. 286. The court's oral charge was erroneous.—*Conrad v. Gray*, 109 Ala. 130; *M. & O. R. R. Co. v. George*, *supra*. Charge 1 given for plaintiff was erroneous.—*B. R. & E. Co. v. Bynum*, 139 Ala. 389. The 2nd and 3rd charges given for plaintiff were erroneous.—*L. & N. R. R. Co. v. Mitchell*, 134 Ala. 261; *Southern Ry. Co. v. Bunt*, 131 Ala. 591. The defendant was entitled to the general affirmative charge upon the whole case and upon the several counts.—*H. A. & B. R. R. Co. v. Walters*, 91 Ala. 443; *Holland v. T. C. I. & R. R. Co.*, 91 Ala. 452; *L. & N. R. R. Co. v. Banks*, 104 Ala.

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516; *Sloss Co. v. Knowles*, *supra*; *L. & N. R. R. Co. v. Boland*, *supra*. Charges 5 and 9 requested by defendant should have been given.—*Clements v. A. G. S. R. R. Co.*, 127 Ala. 156; *Sloss Co. v. Mobley*, *supra*.

J. A. BILBRO, for appellant.—It is the duty of the master to furnish suitable appliances and examine them to see if they are reasonably safe.—*Campbell v. L. & N. R. R. Co.*, 109 Ala. 520; 4 Mayf. Dig. § 369; 1 Le batt on M. & S. pp. 328 and 343-4. The plaintiff had the right to assume that the handle was safe for the service unless he knew to the contrary.—*L. & N. R. R. Co. v. Baker*, 106 Ala. 624; *L. & N. R. R. Co. v. Hawkins*, 92 Ala. 241. Counsel discuss other assignments but cites no authority.

ANDERSON, J.—It appears from the evidence that the plaintiff's fall and injuries were the result of the breaking of a cedar lever used by him and others in propelling a hand car upon which they were riding while in the discharge of their duty to the defendant. It also seems to be a question of fact as to whether there was or was not a latent defect in the lever which caused it to break. If the breaking of the lever was due to a hidden defect not known to the master, or which had not been discovered by the use of ordinary diligence, then the master would not be liable for injuries resulting therefrom. On the other hand, if the lever broke because of its general insufficiency to perform the functions for which it was used, it was for the jury to determine whether or not the master was negligent in furnishing such a handle, and the plaintiff had a right to expect that one would be furnished which could be used with safety, and would not be charged with an assumed risk unless its insufficiency was known to him. It is the duty of the master to furnish the servant reasonably safe appliances. The servant may assume that the appliances furnished are free from defect. He is not required to exercise ordinary care to ascertain the defect.—*L. & N. R. R. Co. v. Hawkins*, 92 Ala. 241, 9 South. 271.



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Mr. Bailey, in his work on Master's Liability for Injuries to Servant (page 2), repeats the long-established rule as to the implied obligation of the master "that he shall provide suitable means and appliances to enable the servant to do his work as safely as the hazards incident to the employment will permit. \* \* \* In the performance of these duties, the master is bound to the exercise of reasonable and ordinary care, and such only." The authorities are all agreed that the degree required to be exercised is that of ordinary care; yet as to what measure of diligence will constitute ordinary care in its relation to particular facts and circumstances, and what comparisons and tests may be, or ought to be, applied as a basis for determining whether the act or omission was the exercise of such degree of care, there is apparent conflict. It was very truly said by the federal Supreme Court in a recent case: "There is no fixed standard in the law by which a court is enabled to arbitrarily say in every case what conduct should constitute ordinary care under any and all circumstances." The terms "ordinary care," "reasonable prudence," and such like terms, as applied to the affairs and conduct of men, have a relative significance, and cannot be arbitrarily defined. What may be deemed care in one case may under different surroundings and circumstances be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonably prudent men under a similar state of affairs. It was, therefore, a question for the jury to determine whether the breaking of the lever was due to its insufficiency to perform the service for which it was adopted, or to a latent defect unknown to the master; and, if to the former, it was also within the province of the jury to determine whether the insufficiency of the lever was known to the plaintiff and he had therefore assumed the risk. It must, therefore, be observed that the affirmative charge was properly refused.

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The second count, as amended, was not subject to the demurrer interposed. It was framed under the second subdivision of the employer's liability act, and ascribes the injuries of the plaintiff to the negligence of one Farmer, who had superintendence intrusted to him, in that he failed to keep the handle of the car in proper order and permitted the plaintiff to use it while in a defective condition. The gravamen of the count is the negligence of Farmer and his failure to keep the car in order, and his permitting the plaintiff to use it is a conjunctive averment, and the count does not attempt to set up two separate and distinct causations, nor does it come within the influence of the cases of *R. & D. R. Co. v. Weems*, 97 Ala. 270, 12 South. 186, and *H., A. & B. R. R. v. Dusenberry*, 94 Ala. 413, 10 South. 274. Nor was the second count subject to any of the grounds of demurrer assigned; but we do not wish to be understood as holding that it is a perfect count.

If there are two ways of discharging the service, apparent to the employe, one dangerous and the other safe, or less dangerous, he must elect the safe or less dangerous way, and cannot recover for an injury sustained when the danger is imminent and so obvious that a prudent man would not incur the risk under similar circumstances.—*Bear Creek Mill Co. v. Parker*, 134 Ala. 293, 32 South. 700; *L. & N. R. R. Co. v. Orr*, 91 Ala. 548, 8 South. 360; *M. & O. R. R. v. George*, 94 Ala. 200, 10 South. 145. Pleas C and D do not charge that a safe way was apparent to or known to plaintiff, and were subject to the demurrer interposed, which was properly sustained.

In order for the plaintiff to be charged with the assumption of risk, it is not sufficient that the defect be obvious; but it must convey to a mind like his the danger that may or is likely to result from the defect. It is important here to note a distinction well elucidated in the cases of *Russell v. M. & St. L. R. R.*, 32 Minn. 230, 20 N. W. 147, and *Cook v. St. P. R. R.*, 34 Minn. 45, 24 N. W. 312, viz.: "It is one thing to be aware of defects in the instrumentalities or plant furnished by the master for the performance of his services and another thing to know or appreciate the risks resulting or

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which may follow from such defects. The mere fact that the servant knows the defects may not charge him with contributory negligence or the assumption of the risk growing out of them." The question is: Did he know, or ought he to have known, in the exercise of ordinary common sense and prudence, that the risks, and not merely the defects, existed? See, also, Bailey's Master's Liability for Personal Injuries, 184. The demurrers to pleas 4, F, and G were properly sustained.

In the case of *L. & N. R. R. Co. v. Stutts*, 105 Ala. 368, 17 South. 29, 53 Am. St. Rep. 127, there is an expression by the writer on page 367 of 105 Ala., page 29 of 17 South. (53 Am. St. eRp. 127), which is misleading and rather commits the court to the doctrine of assumption of risk based upon a mere knowledge of the defect, regardless of a knowledge of the dangerous consequences; but the writer further on quotes, and there appears the additional fact that the servant must have acquired notice of "an incurred risk of danger." Again the writer says: "The only defects brought to light and complained of were patent, and understood by the engineer as well as by the company," etc. If they were patent and understood by the engineer, then he, of course, not only knew of the defects, but knew that their existence increased his risk or danger, and the opinion is really in line with what we hold in the case at bar.—*Birmingham Railway & Electric Co. v. Allen*, 99 Ala. 359, 13 South. 8, 29 L. R. A. 457; *Eureka Company v. Bass*, 81 Ala. 200, 8 South. 216, 60 Am. Rep. 152.

The trial court properly overruled the demurrer to the replication to the third plea, and properly sustained the one to the rejoinder. It was not necessary for the plaintiff to notify the defendant of the defect, if the defendant already knew the same. The law does not require the doing of a useless thing. The case of *Thomas v. Bellamy*, 126 Ala. 253, 28 South. 707, merely repeats the statute, which relieves the servant of giving notice if he is aware the master knew of the defect; but we do not think that the statute means that the servant is required to give the notice, whether the master was aware of it or not, unless he knew the master knew it. If the

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master knew of it, then the servant is relieved of giving the notice, although he may not know that the master knew of the defect.—*Birmingham Railway & Electric Co. v. Allen*, 99 Ala. 359, 13 South. 8, 20 L. R. A. 457.

The trial court did not err in permitting plaintiff to prove that there were other timbers where Farmer put in the cedar stick. It was for the jury to determine if the other timbers were stronger and better, and if a failure to get a stronger and better one did not tend to show negligence in furnishing ways, works, etc. It is true that the use of the other timbers would not relieve the master if they were insufficient nor was it required to get other timbers if the one used was sufficient; but the failure to get a better one, which was as convenient as the one that was gotten, was a circumstance for the jury.

There was no error in permitting the plaintiff to show that others had been riding backward. While a custom to violate a rule does not make the violation less negligent, yet the existence and promulgation of the rule forbidding the hands from riding backward was disputed, and the fact that they frequently rode backward in the presence of Farmer was a circumstance for the consideration of the jury in determining whether or not such a rule existed.

The plaintiff had the right to show that he was ruptured by the fall, and to exhibit himself to the jury, if the trial court saw fit to permit him to do so. It is true that the complaint did not claim damages for a rupture, and the record discloses no amendment to cover this claim; but the bill of exceptions recites that leave was asked and granted to amend in this respect, and we will presume from these recitals, that the complaint was amended so as to meet this evidence, in order to sustain the ruling of the lower court.—*Lesne Case*, 3 Ala. 741; *Bettis' Case*, 28 Ala. 214; 2 Am. & Eng. Ency. Pl. & Pr. 468; 1 Am. & Eng. Ency. Pl. & Pr. 581, 582.

The trial court properly sustained the objection as to "whether or not McGowan would have been hurt if he had been standing behind the lever." It called for the mere conclusion of the witness. It was for the jury to

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determine from the evidence whether or not his position on the car was the cause of his injury.

There was no error in the oral charge as excepted to by defendant.

There was no error in giving charges 1, 2, 3, and 4, requested by the plaintiff.

Charges 1, 2, and 3, requested by the defendant, were the affirmative charges, and have been fully discussed in this opinion. They were properly refused.

Charge 4, requested by the defendant, was properly refused. If not otherwise bad, it seeks to charge the plaintiff with a mere knowledge of the kind of wood and its weakness, whether he knew that it was dangerous to use such a handle or not.

Charge 5, requested by the defendant, was properly refused. It was abstract. The injury was not the result of tools furnished, but was the result of a defect in the ways, works, etc.

Charge 6, requested by the defendant, was properly refused. It invades the province of the jury.

Charge 7, requested by the defendant, was properly refused. If not otherwise bad, it seeks to relieve the defendant if the condition of the handle was open to ordinary observation, yet the defect may not have been so open to observation as to apprise the plaintiff that it was dangerous or risky to use the same.

Charge 8, refused to the defendant, if not otherwise bad, ignores the fact as to whether the split or hollow, if open to ordinary observation, was of such character to put plaintiff on notice that it was dangerous or risky to use the same.

Charge 9, requested by the defendant, was properly refused. It was calculated to mislead the jury to conclude that there was no duty upon the defendant to see that the handle was not defective, notwithstanding its defective condition may have been such, upon examination, that it would be dangerous to use it.

Charge 10, requested by the defendant, was properly refused. If not otherwise bad, it pretermits a knowledge of the defendant of a defect in the handle.

There was no error in refusing the other charges requested by the defendant.

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After a careful consideration of the evidence, we are not willing to reverse the action of the trial court in overruling the motion for a new trial.

The judgment of the circuit court is affirmed.

TYSON, C. J., and DOWDELL and MCCLELLAN, JJ., concur.

ANDERSON, J. (On Rehearing.)—Upon a reconsideration of this case, while not receding from the general principles enunciated in the original opinion as applied to the questions as presented, and without indorsing the correctness of the pleading throughout the case, which we treated as presented, and upon the grounds of demurrer assigned, we are of the opinion that the case should be reversed for the giving of charge 4, requested by the plaintiff. When the complaint specifies the defects, it becomes matter of description, which it is incumbent on plaintiff to prove with equal particularity, as also that he was injured by reason of said defect. If, therefore, the evidence fails to satisfy the jury that the particular defect existed, or that plaintiff was injured by reason thereof, he would not be entitled to recover.—*Mobile & Ohio R. R. v. George*, 94 Ala. 219, 10 South. 145; *L. & N. R. R. Co. v. Coulton*, 86 Ala. 129, 5 South. 458. The complaint in the case at bar avers that the defects were that “the handle of the car was weak and insufficient for the service for which it was used, that it was made of cedar, that it was split, that it was hollow, and that it was unsafe for use.” Charge 4 predicated a finding for the plaintiff if the handle was insufficient and weak because made of cedar, and premitted the duty of plaintiff to prove the other defects averred and particularized.

The application for rehearing is granted, and the judgment of affirmance is set aside, and the judgment of the circuit court is reversed, and the cause remanded.

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**Wolf v. Smith.***Action for Damages for Injury to Employee.*

(Decided Dec. 20th, 1906. 42 So. Rep. 824.)

1. *Master and Servant; Injury to Servant; Complaint; Sufficiency.*—A complaint alleging that while in the discharge of his duties as an employe in defendant's mine, a stick of dynamite exploded in his hand injuring him, and that the injury was proximately caused by the negligence of the employer in failing to provide a reasonably safe place, to work, shows sufficiently a causal connection between the injury and the negligence, and is not open to demurrer that it does not state facts sufficient to constitute a cause of action, that no act of negligence is averred, and that the negligence averred is a conclusion.
2. *Appeal; Rulings on Demurrer; Review.*—Where the record shows the granting of a motion to strike out parts of a complaint, but does not show what parts were stricken, nor whether the complaint as shown by the record was the same as when the demurrer was sustained to it, this court cannot review the ruling on demurrer.
3. *Master and Servant; Injury to Servant; Mines; Violation of Statute.*—Section 2917, Code 1896 imposes a statutory duty on the operator of mines for the benefit of the employe therein, and the mine operator is liable in a common law action to an employe injured in consequence of its violation, though such section neither attaches a penalty to nor provides a remedy for a failure to comply with its terms.
4. *Pleadings; Count; Incorporation of Averments of Preceding Counts.*—The averments of a former count may be incorporated in a subsequent count by being therein expressly referred to.
5. *Master and Servant; Injury to Servant; Complaint; Sufficiency.* A complaint alleging that it was the duty of the mine operator, while operating it, to provide a stretcher and a woolen and water-proof blanket for use in carrying away injured persons, and to keep in store at the mine, oil, and bandages for use in emergency, and that the operator of the mine failed to furnish such articles, sufficiently states the duty imposed on the mine operator by Section 2917 of the Code of 1896.

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6. *Mines and Minerals; Statutory Regulation; Validity.*—Section 2917, Code 1896, prescribes what shall be necessary as a part of the proper equipment of a mine before any person shall engage in the business of mining, and is valid as a regulation for the protection of the public welfare and comfort.
7. *Master and Servant; Injury to Servant; Mines; Violation of Statutory Duty.*—A negligent failure of an operator of a mine to comply with the requirements of Section 2917 of the Code of 1896, may give a cause of action to an employee injured while in the performance of his duty, without negligence on the part of the operator or his servant.

APPEAL from Jefferson Circuit Court.

Heard before Hon. A. A. COLEMAN.

Action by D. C. Wolf against R. D. Smith. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

This was an action for damages. The complaint contains five counts, the first of which is in the following language: "Plaintiff claims of the defendant \$20,000 damages, in this: That on and prior to the 3d day of February, 1904, the defendant was engaged in operating Bradford Mines, in Jefferson county, Alabama; that on the date aforesaid plaintiff was in the employment of the defendant, and while in a discharge of his duties, under his employment, a stick of dynamite or other explosive exploded in his hand, so badly injuring him that one eye was put out, both of his hands had to be amputated, and his hearing was impaired; that he has suffered great mental agony and physical pain; that he has paid and has obligated himself to pay large sums of money for medicine, medical and surgical attention, and nursing; that he has lost his earning power; that he was confined to his bed for a long space of time; that he was rendered sick, sore, and lame; that he was permanently injured and disabled. And plaintiff avers that his said injuries were proximately caused by the negligence of the defendant in failing to provide him with a reasonably safe place in which to do his work under his employment. Wherefore he sues and claims damages as aforesaid." It is unnecessary to set out the second count, or the motions and demurrers filed thereto, as the record fails to disclose intelligently the ac-



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tion of the trial court thereon. Count 3: "Plaintiff claims of the defendant \$20,000 damages, in this: That on the 3d day of February, 1904, defendant was operating a coal mine, called 'Bradford Mines,' in Jefferson county, Alabama; that plaintiff was working in said mine as an employe of the defendant, and while at work therein was injured and damaged, as is more particularly set out in the first count of this complaint. And plaintiff avers that it was the duty of the defendant, while operating said mine, to provide a stretcher properly constructed, and woolen and water-proof blankets in good condition, for use in carrying away any person that might be injured while at work in said mine. Plaintiff avers that the defendant negligently and wholly failed to provide such stretcher and blankets, and because thereof, when plaintiff was injured as aforesaid, which was in the nighttime, and the weather was very cold, on account of the failure of defendant to provide such stretcher and blanket, he was compelled to walk a long ways on foot through the mud, and he was compelled to wade through cold water; that plaintiff was at the time wet, and that his injuries were greatly aggravated, and his suffering greatly increased, both mentally and physically, on account of the failure of defendant to provide such stretchers and blankets. And plaintiff further avers that it was the duty of the defendant to be kept at the store which was at said mine linseed or olive oil, bandages, and linen for use in emergencies. And plaintiff avers that defendant negligently failed to keep said linseed oil or olive oil, bandages, and linen at said store, and because thereof plaintiff's injuries were greatly aggravated; that by reason thereof his wounds could not be bandaged or oil applied to the same until long afterwards, and after he had been removed a long distance therefrom, and his injuries and suffering were proximately greatly increased thereby." It is unnecessary to set out the other counts.

The following demurrers were interposed to the first count, and sustained: "(1) It does not state facts sufficiently to constitute a cause of action against the defendant. (2) No act of negligence is averred or set out. (3) Negligence is averred merely as a conclusion

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of the pleader. (4) The count fails to allege or show in what respect said place was not reasonable safe for the plaintiff to do his work in." The same grounds of demurrer were interposed to the third count as to the first count. These demurrers were also sustained.

FRANK S. WHITE & SONS, for appellant.—Counsel discuss assignments of error and cite but one authority which is the proposition that the complaint was sufficient as to its averments of negligence.—*Mary Lee C. & R. R. Co. v. Chambliss*, 97 Ala. 171.

WEATHERLY & STOKES, for appellee.—The failure complained of should be alleged to be a negligent failure. The counts present a common law action and rule of liability.—*Clements v. A. G. S. R. R. Co.*, 127 Ala. 167. The averment in the complaint is defective in not pointing out in what respect the mine was not safe.—*L. & N. R. R. Co. v. Jones*, 30 South. 590. The mere fact that the duty imposed is statutory does not relieve the plaintiff from the necessity of charging and proving negligence.—*Zeigler v. S. & N. R. R. Co.*, 58 Ala. 594.

DENSON, J.—This action sounds in damages for a personal injury suffered by the plaintiff in the employment of the defendant. The first count of the complaint is framed with respect to the common-law liability of the master, and ascribes the injury to the negligence of the master in failing to provide a reasonably safe place for plaintiff to do the work he was employed to do. It is true a complaint in suits of this character must show sufficient causal connection between the act complained of and the injury. While the averments of the complaint are general, yet, under the numerous adjudications of this court in respect to the sufficiency of such averments, we are of the opinion that the count shows with sufficient certainty causal connection between the injury and the cause averred, and the demurrer to the first count should have been overruled.

A demurrer to the second count was sustained, but the judgment entry shows that on motion of the defendant certain parts of the count were stricken out, with-

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out showing the parts that were stricken. The motion to strike does not appear in the record, and we have no way of determining what parts of the count were stricken, nor whether the count as it appears in the complaint, as shown by the record, is the same that it was when the court ruled on the demurrer. The only demurrer to the count bears date of filing August 16, 1904, the motion to strike was granted the 3d day of November, 1905, and the granting of it precedes the ruling on the demurrer to the count. This state of uncertainty appearing on the face of the record, it would be purely conjectural for this court to say that the count as it stands in the record is the same that it was when the court ruled on the demurrer to it. So we must decline to consider the ruling of the court on the demurrer to the second count.

Obviously count 3, as amended, is based on section 2917 of the Code of 1896, which is in this language: "It shall be the duty of the operator, agent or superintendent of each mine to keep at the mouth of the mine, or at any other such place about the mine as shall be designated by the chief mine inspector, a stretcher, properly constructed, and a woolen and waterproof blanket in good condition for use in carrying away any person who may be injured at the mines: Provided, that where more than two hundred men are employed, two stretchers and two woolen and waterproof blankets shall be kept in mines generating fire damp. A sufficient quantity of linseed or olive oil, bandages and linen shall be kept in store at the mines for use in emergencies and bandages shall be kept all the time." Manifestly the statute imposes the duty of keeping the articles and emollients mentioned for the benefit of those persons in the employment of the owner or person operating the mine who may be injured at or in the mines while in the performance of their duties as such employees. It is not a common-law duty, but one newly created by statute, and which, but for the statute, might be omitted. No penalty is attached for a failure on the part of the person operating the mine to comply with the requirements of the statute; but it is a general and well-established rule that the wrongdoer is liable in damages to the

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party injured by the violation of a statutory duty.—1 Cyc. p. 679. Neither does the statute provide a remedy for a failure to comply with its terms; but this presents no obstacle to recovery in a proper case against the wrongdoer. The common law affords the remedy, and, if the plaintiff has a cause of action, the proper remedy has been resorted to in this instance.—*Autauga County v. Davis*, 32 Ala. 703; *Birmingham Min. R. R. Co. v. Parsons*, 100 Ala. 662, 13 South. 602, 27 L. R. A. 263, 46 Am. St. Rep. 92.

The third count as amended avers the relation of master and servant, that the defendant was operating a coal mine, that plaintiff was working in said coal mine, and while so working he was injured. The first count sets out the injuries and damages suffered by the plaintiff explicitly, and the count we are considering, in its averments with respect to the injuries, refers to the first count. This is a permissible mode of pleading.—*Bryant v. Southern Ry. Co.*, 137 Ala. 488, 34 South. 562. It also states with sufficient clearness the statutory duty imposed on the defendant and the defendant's negligent breach of that duty. It is also averred that, by reason of the negligent failure to comply with the statutory requirements, plaintiff's injuries were greatly aggravated; that his wounds could not be bandaged or oil applied to them until long after they were received, and he had been removed along distance from where the injuries were received. It is not averred in the count that the injury received by the plaintiff was caused by negligence on the part of the defendant, or of any one for whose act the defendant is responsible. The court sustained a demurrer to the count as amended; the material ground of the demurrer being that the count as amended fails to set forth a substantial cause of action. The theory of the demurrant is that the statute is violative of the Constitution, in that it arbitrarily invades the rights of the defendant and deprives him of his property rights without due process of law, and in its enactment that the Legislature was not within a legitimate exercise of the police power of the state. It is obviously true that, unless the statute falls within the class of police regulations, it cannot be

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upheld, if its effect is to require the mine owner or operator to keep the articles at the mine for the use of employes who may be injured there, without compensation from any source. That would be depriving the defendant of his property without due process of law. "Private property shall not be taken for private use."—*L. & N. R. R. Co. v. Baldwin*, 85 Ala. 619, 627, 5 South. 311, 7 L. R. A. 266; *Moorse v. Stocker*, 1 Allen (Mass.) 150; *State v. Glen*, 7 Jones, Law (N. C.) 321; *Millett v. People*, (Ill.) 7 N. E. 631, 57 Am. Rep. 869, 873.

The section of the Code under consideration is section 10 of an act of the Legislature entitled "An act to regulate the mining of coal in Alabama." This act was approved on the 16th day of February, 1897, and now forms chapter 78 of the Code of 1896. That the law was enacted by the Legislature in recognition of the known hazards incident to the business of mining coal, and for the purpose of minimizing such hazards, and of promoting the safety, comfort, and health of those engaged as employes in such business, is discoverable from the subjects dealt with in the act and the treatment of those subjects. To accomplish the purpose in view nothing could be more effectual than the enactment of a law the enforcement of which would secure the proper appointment, the proper construction, and the proper equipment of the mine to be operated. While it is true no citizen can be arbitrarily deprived of his property, at the same time it must be remembered that every citizen holds his property "subject to such reasonable control and regulation of the mode of keeping and use as the Legislature, under the police power, may think necessary for the preventing of injuries to the rights of others and the security of the public health and welfare." We shall not attempt a definition of the police power, that may be learned, if desired, in the text-writers and from the adjudged cases, albeit it has been said that a definition has rarely been attempted by the courts, and the attempt has never been attended with complete success.—*Re Morgan*, (Colo.) 58 Pac. 1071, 47 L. R. A. 52, 77 Am. St. Rep. 269; *C., B. & R. R. Co. v. Nebraska*, 47 Neb. 549, 66 N. W. 624, 41 L. R. A. 481, 53 Am. St. Rep. 557. "The reason for the existence of the police power

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rests upon the theory that one must so use his own as not to injure others, and as not to interfere with or injure the public health, safety, morals, or general welfare."—*Re Morgan, supra*; Cooley's Const. Lim. (6th Ed.) 710; Tiedeman on Lim. of Police Power, § 1; Potter's Dwarrris on Statutes, p. 458; *State v. Harrington*, 68 Vt. 622, 35 Atl. 515, 34 L. R. A. 100. It is a truism that the Legislature, in selecting a subject for exercise of the police power, must keep within its proper scope. "And the Legislature cannot, under the guise of a police regulation, arbitrarily invade private property or personal rights; but the court must be able to perceive some clear and real connection between the assumed purpose of the law and its actual provisions." We cannot doubt that the general subject of the legislation is within the legitimate exercise of the police power.

With respect to the particular section of the act involved in this discussion, the legislative power is apparent. It is that the material, articles, and emollients should be ready and easily accessible in caring for the class of persons designated, in alleviating their pain and suffering, and probably for the saving of their lives. It may be, we cannot tell, that there might be instances when such articles, ready at the place for use, would be the means for saving the life of the injured. It seems to us that furnishing the material, articles, and emollients required by the statute—section 2917 of the Code of 1896—should be considered, and was intended by the Legislature, as a part of the proper equipment of a coal mine, necessary before any person should engage in that business which, according to common knowledge, is beset with many dangers, and in the prosecution of which accidents are known frequently to occur. In this view it seems that it may be reasonably said that the statutory requirements tend to conserve the comfort and welfare of those who are subjected to the dangers; therefore, that the public welfare and comfort are involved; and that in the enactment of the statute the Legislature was within the legitimate exercise of the police power.—*Peoples v. Smith*, (Mich.) 66 N. W. 382, 32 L. R. A. 853, 62 Am. St. Rep. 715; *Health Department v. Rector of Trinity Church*, 145 N. Y. 32, 39 N.

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E. 833, 27 L. R. A. 710, 45 Am. St. Rep. 579. We need not decide what would be the result if the statute had gone to the extreme as instanced in appellee's brief. Considering the articles required to be furnished a part of the proper equipment of the mine, a negligent failure to furnish them may give a cause of action to an employee injured while in the performance of his duties without negligence on the part of the master or his servants.

Upon these considerations we conclude that the third count as amended presents a cause of action and is not subject to the demurrer interposed. For sustaining the demurrer to this count, the judgment is reversed, and the cause is remanded.

Reversed and remanded.

TYSON, J. C., and HARALSON and SIMPSON, JJ., concur.

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### *Damages for Personal Injury to Employee.*

(Decided Feb. 14th, 1907. 43 So. Rep. 110.)

1. *Master and Servant; Operation of Mine; Injury to Employee; Evidence.*—Evidence in this case examined and stated, and held sufficient to require a submission of the questions to the jury as to whether defendant was negligent, and as to assumption of risk and contributory negligence on part of plaintiff.
2. *Same.*—One working a mine, whether a servant of the corporation, or working there by invitation, assumes the risk incident to the work, but increased risks caused from negligence of the mine operator are not incident to the business.
3. *Same; Instruction.*—A charge asserting that if plaintiff was hurt while fixing to set a temporary prop to support the roof,

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which fell on plaintiff, and plaintiff knew it was for such purpose, there must be a finding for defendant, pretermittting all negligence on part of defendant and hypothesizing none on part of plaintiff, was erroneous and properly refused.

APPEAL from Birmingham City Court.

Heard before Hon. CHAS. A. SENN.

Action by Oscar Skelton against the Birmingham Mining & Contracting Company. Judgment for plaintiff, defendant appeals. Affirmed.

The nature and character of the action, together with the facts relied upon to support the same, and to support the defense of contributory negligence and assumption of risk, fully appear in the opinion. Charges 2 and 3, referred to in the opinion, were the affirmative charges as to counts 1 and 2 of the complaint, respectively. Charge 6 is as follows: "I charge you that if you believe from the evidence that at the time plaintiff was hurt that he was fixing to set a temporary prop, and that such a prop was to support the roof, which fell on plaintiff, and that plaintiff knew that it was for such purpose, that you must find for defendant." There was verdict and judgment for plaintiff for \$750.

PERCY & BENNERS, for appellant.—The danger of the roof, which was composed of dirt, falling, was obvious, and the risk arising from this danger was assumed by the plaintiff.—*Brown v. Electric Railway Co.*, 70 Am. State Repts. 666; *Mielke v. Chgo. & Northwestern Ry. Co.*, 74 Am. State Repts. 834; *Olson v. Maple Grove Coal Co.*, 87 N. W. 736; *Vincennes Water Supply Co. v. White*, 24 N. E. 747. Plaintiff assumed the risk in this case and cannot recover.—*Sloss Iron & Steel Co. v. Knowles*, 129 Ala. 410; *Pioneer Mining & Mfg. Co. v. Thomas*, 133 Ala. 279. The doctrine that the master must furnish a safe place to work has no application to a case where the place becomes unsafe during the progress of the work. As to such danger the law only requires reasonable care to employ competent men and provide suitable material.—*Petaja v. Mining Co.*, 32 L. R. A. 435; *Consolidated Coal Co. v. Floyd*, 25 L. R. A. 856. Knowledge of defect on the part of the employer



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does not constitute negligence unless there has been a reasonable time to remedy it.—*Seaboard Mfg. Co. v. Woodson*, 94 Ala. top of page 147; *Clements v. A. G. S. R. R. Co.*, 127 Ala. 166. Plaintiff cannot say that on account of inexperience in the work in which he was engaged he did not assume the risk arising from its obvious dangers.—*Worthington v. Goforth*, 124 Ala. 656; *Northern Ala. R. R. Co. v. Beecham*, 140 Ala. 422.

BOWMAN, HARSH & BEDDOW, for appelle.—So far as is shown by the bill of exceptions the court is not requested to give the charges in writing to the jury; and in any event the charges were not separately asked, and if one charge is bad all are bad.—*Pearson v. Adams*, 129 Ala. 157; *Millikan v. Maund*, 110 Ala. 232. No exceptions were reserved at the time of the refusal of the court to give the charges.—*Reynolds v. The State*, 68 Ala. 503; *Tannile v. Walsh*, 81 Ala. 160. If the evidence is conflicting in a case where the complaint charges in different counts that plaintiff was an employe and that he was not an employe, neither of the counts can be taken from the jury so far as that question is concerned.—*Sloss I. & S. Co. v. Tillson*, 141 Ala. 152. Plaintiff had a right to trust in Brown's superior judgment.—*Southern Ry. Co. v. Guyton*, 122 Ala. 231. The 6th charge was properly refused.—*Ala. S. & W. Co. v. Wrenn*, 136 Ala. 493; *Southern Ry. Co. v. Guyton*, 122 Ala. 231.

DENSON, J.—This action sounds in damages for personal injuries suffered by the plaintiff as a consequence of alleged negligence on the part of the defendant or its servants. The complaint is composed of four counts. It is alleged in the first and second counts that a part of the roof of a mine which was being operated by the defendant fell upon or against the plaintiff and broke his leg, while he was in said mine by invitation of the defendant, but not as servant or employe of the defendant. The first count ascribes the falling of the roof and consequent injury to a defect in the condition of the ways, works, machinery, or plant of the defendant, in that part of the roof or top was not sufficiently secure, or was otherwise in danger of falling. In the second

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count the falling of the roof and injury are laid to the negligence of F. H. Brown, the defendant's superintendent. The third and fourth counts each allege that the plaintiff was working in the mine as an employe of the defendant, and the allegations of negligence in those counts correspond to those of the first and second counts, respectively. The only errors assigned on this appeal relate to charges refused by the court to the defendant (appellant). The first in the series of charges refused is the general affirmative charge, and it applies to the whole case.

The first question presented by this charge for determination here is whether the evidence was such as to require the trial court to withdraw from the jury the consideration and determination of the question of negligence on the part of the defendant or its servant. The evidence may be summarized as follows: The defendant was operating what are known as "Juanita Mines," in Jefferson county, and the plaintiff was, when injured, mining ore in said mines, either as an employe of the defendant, or by invitation of the defendant, and for its benefit. F. H. Brown was defendant's superintendent or "mine boss," in charge and control of the mining operations; and the plaintiff testified that he was working under Brown's orders and that Brown was there at the mines every day from 6:30 o'clock in the morning until 5 o'clock in the afternoon. Plaintiff's leg was broken by the falling of the roof of an entry of the mine in which he was at work. He and his assistant, or "buddy," Nix, opened the entry four days before the accident occurred. Plaintiff had worked in the entry every day since it was started, and the work was at the time of the accident still being done by daylight. They would drive the entry about three feet ahead, when Brown, the "mine boss," would go in and set timbers to support the roof permanently. The arrangement of the timbers may be aptly described by comparing it to a table. The square sets of timbers referred to by the witness correspond to the legs of a table, across the top of which was stretched a straight piece of timber called a "collar." The square sets of timbers were placed about three feet apart, and across the top

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of them, running with the entry and stretched from one collar to the next collar, were laid timbers called "laggings," about five feet long, which were placed for the purpose of holding the roof or top of the mine. There is evidence which tends to show that the roof was, in the language of one of the witnesses, "loose dirt," and in that of another, "red clay." The evidence showed that it was the duty of the defendant to set the timbers, and that Brown, the "mine boss," set those that were put up. The evidence on the part of the plaintiff tended to show that the laggings which were put in the entry were placed too wide apart and could not hold a roof of the kind in question, and that when a place is not held up immediately after it is mined out, or as soon as there is room to get the timbers in, it is then almost impossible to hold it with timbers after it takes weight; but, when the timbering is done properly, it holds the roof. There is also a tendency in the evidence to show that the laggings were not placed so as to be solid, and that to support a roof of that kind the lagging should have been solid. The proof further tended to show that there could not be a square set of timbers with every stroke of the pick; that the mining must proceed three feet beyond where the permanent timbers stop before other permanent timbers are put in; that "the way to hold the roof beyond where the permanent timbers stop, until you get ready to put in permanent timbers, is to put in a temporary prop"; that, when the permanent timbers are put in, the lagging extends a short distance beyond, and, with the lagging put in "good and tight," it will hold the roof for a short distance, or long enough to put in temporary timbers, if the laggings are put in properly. The evidence further tended to show that the plaintiff's "buddy," Nix, had been injured, and had not worked with him for two days at the time of plaintiff's injury; that a negro was working in Nix's stead; that they had driven the entry about twelve feet deep, and four or five feet beyond the last set of permanent timbers; that Brown went into the mine where plaintiff was just before the accident, looked at the roof and sounded it with his hand, and said to plaintiff it seemed sound and solid. Plaintiff told Brown he thought he

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was ready for timbers. Brown told him he wanted him to put in a little shot in the corner, but not to fire it until he put in a "temporary," and for plaintiff to dig a "hitch" for the temporary, and he would go out, cut, and throw down the temporary timber. While plaintiff was cutting the "hitch," the roof fell and injured him.

Brown's evidence tended to show that the entry had not proceeded further than four feet beyond or ahead of the last set of permanent timbers, and that the place was not ready for another set of permanent timbers when plaintiff called for them; that the permanent timbers that had been set were properly set, and the falling of the roof was not due to any defect in the permanent timbers or the manner in which the lagging was done; and that no part of the roof over the permanent timbers fell. He further testified that there was nothing to indicate that the roof above plaintiff was likely to fall; that it seemed solid; that he went under it and sounded it, and it was solid; that he told plaintiff it was all right, but to put in the temporary prop before he shot. Notwithstanding the undisputed fact that no part of the roof over the permanent timbers fell, yet, in view of other tendencies of the evidence, we do not think that this should operate to take away from the jury the question whether or not the lagging was properly done. In other words, it was open for the jury to infer that the lagging was laid improperly, and not as a reasonably prudent man under like circumstances would have laid them, and that this improper lagging or setting of the permanent timbers contributed to the weakness of the roof that fell, and precipitated its fall. In this view we conclude that the question of the defendant's negligence vel non was one to be determined by the jury, which could not properly have been withdrawn from their consideration.

The next question is whether the evidence is such as should have required the trial court to determine as matter of law that the plaintiff had such knowledge of the situation, and of the risks and dangers connected therewith, that, in continuing to work under the roof, he should have been held to have assumed the risks of the situation, or to have been guilty of contributory neg-

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ligence. Indisputably the work in which the plaintiff was engaged at the time he was injured was attended with hazards and dangers. As was said in *Sloss Iron & Steel Co. v. Knowles*, 129 Ala. 410, 30 South. 584, the work was attended with risks and dangers that human foresight cannot always guard against; and the plaintiff, whether considered in the attitude of a servant or one working in the mine by invitation, must have been held to assume the risks incident to the work in which he was engaged. Thus the law is settled not only by our own, but also by the courts of last resort in other jurisdictions.—*Perry v. Marsh*, 25 Ala. 659; *Sloss Iron & Steel Co. v. Knowles*, 129 Ala. 410, 30 South. 584; *Linton Coal & Min. Co. v. Persons*, 15 Ind. App. 69, 43 N. E. 651; *Colorado Midland Ry. Co. v. O'Brien*, 16 Colo. 219, 27 Pac. 701; *Fitzgerald v. Connecticut River Paper Co.*, 155 Mass. 155, 157, 29 N. E. 464, 31 Am. St. Rep. 537; *Dresser, Employer's Liability*, p. 406, §§ 90, 103. But increased risks and dangers caused by negligence on the part of the employer are not deemed to be incident to the business, within the meaning of the general rule. "There is a duty resting upon the master which requires him to exercise due care on his part, to the end that the risks and hazards to those in his employ shall not be necessarily increased. When the master performs his duty in this particular, and exercises all the caution and foresight which ordinary care requires in view of the circumstances, then the risks and hazards pertaining to the business as thus carried on are assumed by the employees."—*Dresser, Employer's Liability*, p. 484, § 102. To bring the case at bar within this rule, it is necessary to assume that the defendant exercised due care in the manner in which the permanent timbering was done, and that the strength or stability of the roof that fell was not affected by defective timbering. We have in effect already ruled that the evidence was not such as to place these propositions beyond a reasonable adverse inference. Therefore it was properly a jury question whether the accident by which plaintiff was injured was caused by negligence on the part of the defendant, acting through its superintendent.

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ent or "mine boss," or whether it belonged to the risks incident to the employment.

The next question is, does the evidence so clearly show that the plaintiff was guilty of contributory negligence in remaining at work under the roof as that the court should have determined the question as one of law without referring it to the jury? The evidence without conflict showed that plaintiff had never mined any until he began to open the entry in which he was hurt, for four days before the accident; that he was "green" and inexperienced, and was an ordinary farm hand; and all of this was well known to the "mine boss," under whose orders he testified he was working. Brown was a miner or "mine boss" of several years' experience. He went into the mine, and was told by the plaintiff a few minutes before the accident that he was ready for permanent timbers. Brown examined the roof, sounded it, and pronounced it solid, and told the plaintiff that it was all right, but he wanted him to put in a temporary prop before he shot, and for him to cut a "hitch" in the floor for the prop, while he (Brown) would go and cut the temporary timber and throw it down. Brown left the mine to get the timber, and in a few minutes, while plaintiff was cutting the "hitch," as he was directed, the roof fell on him. Brown further testified that there was nothing to indicate that the roof above plaintiff was likely to fall. Under this evidence, can it be said as matter of law that the plaintiff appreciated the danger of the roof falling, or that it was so glaring, so imminent, or manifest as to prevent a reasonably prudent man from risking it? Brown, who was an expert in such matters, after sounding it, did not appreciate the danger of the roof falling, and it does seem that it would be a stretch of the imagination to say, as matter of law, that the plaintiff did appreciate the danger, and, therefore, that he was guilty of contributory negligence in remaining under the roof to cut the "hitch," as Brown had directed him to do. In the case of *McKee v. Towntellotte*, 167 Mass. 69, 44 N. E. 1071, 48 L. R. A. 542. the supreme court of Massachusetts, through Holmes, J., uses this language: "When we say that one appre-

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ciates a danger, we mean that he forms a judgment as to the future, and that his judgment is right. But if against this judgment is set the judgment of a superior—one, too, from the nature of the callings of the two men, and of the superior's duty, seem to make the more accurate forecast—and if to this is added a command to go on with the work, and therefore to run the risk, it becomes a complex question of the particular circumstances whether the inferior is not justified, as a prudent man, in surrendering his own opinion and obeying the command. The nature and the degree of the danger, the extent of the plaintiff's appreciation of it, and the exigency of the work, all enter into consideration, and no universal rule can be laid down."—*Southern Ry. Co. v. Guyton*, 122 Ala. 231, 25 South. 34; *Haas v. Balch*, 6 C. C. A. 201, 56 Fed. 984. We are of opinion that the question of contributory negligence was one for the jury, and the general affirmative charge was properly refused.

There is evidence in the record which tends to support the case as made by counts 1 and 2 of the complaint; hence charges 2 and 3 were properly refused.—*Sloss Iron & Steel Co. v. Tilson*, 141 Ala. 152, 37 South. 427. Charge 6 pretermits all inquiry as to negligence on the part of the defendant and hypothesizes none on the part of the plaintiff. It was properly refused.

Having found no error in the record, the judgment appealed from is affirmed.

Affirmed.

TYSON, C. J., and HARALSON and SIMPSON, JJ., concur.

[Creola Lumber Co., v. Mills.]

**Creola Lumber Co., v. Mills.***Action for Damages for Injury to Employee.*

(Decided Dec. 20th, 1906. 42 So. Rep. 1019.)

1. *Master and Servant; Injury to Servant; Fellow Servants; Complaint.*—A complaint which alleges that plaintiff was a brakeman on a logging train and received injuries while operating said train, that he was working under the engineer who was entrusted with the superintendence of plaintiff and of the operation of the train, and that while plaintiff was engaged in operating the trains, he was injured, and that the injuries were caused by the negligence of the engineer while in the exercise of such superintendence, shows that the negligence of the engineer while in the exercise of his superintendence, and not as engineer, caused the injury, and is a good complaint under subdivision 2 of Section 1749, Code 1896.
2. *Same; Allegation of Negligence; Sufficiency.*—Where the complaint shows the duty of the employer to exercise care and his failure to do so, the negligence causing the injury may be averred in general terms.
3. *Same.*—A complaint which alleges that the engineer in charge of the train was entrusted with the superintendence of the operation of the same, and of the person injured, and that the injuries were caused by reason of the negligence of the engineer, to whose directions the brakeman, at the time of the injury, was bound to conform and did conform, and that the injury resulted from the brakeman having so conformed, while the engineer was in the exercise of superintendence states a good cause of action under subdivision 3 of Section 1749, Code 1896; the gravamen of the charge being that the injury resulted from the brakeman having conformed to a negligent order given by a co-employee to whose orders he is bound to conform.
4. *Same.*—A complaint based on subdivision 3, Section 1749, Code 1896, must aver the order given and conformed to and that the order was negligently given.
5. *Same.*—A complaint alleging that the injury was caused by the negligence of the engineer employed to operate the train, while so "engaged in the operation thereof," sufficiently alleges that the engineer had "charge or control of the train" within subdivision 5 of Section 1749, Code 1896.



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6. *Same; Contributory Negligence; Jury Question.*—Although the act of dismounting was unnecessary, it is not, under all circumstances, negligence, as a matter of law, for a brakeman to dismount from a moving train and attempt to board the locomotive.
7. *Appeal; Harmless Error; Ruling on Demurrer.*—Defendant filed a plea of contributory negligence alleging that plaintiff negligently placed his foot on the railroad track immediately in front of a locomotive operated thereon, and thereby sustained the injury complained of. A second plea of contributory negligence averred that his foot was on the track of the road. A demurrer was sustained to the second plea. Held, the defendant was entitled under the first plea to prove the defense set up by the second plea, and the sustaining of the demurrer thereto was harmless.
8. *Master and Servant; Injury to Servant; Contributory Negligence; Sufficiency of Plea.*—A plea of contributory negligence which alleges that plaintiff was guilty of contributory negligence, in that he attempted to get upon the locomotive while the same was in motion, failing to aver the facts showing wherein his attempt was negligent, is demurrable.
9. *Same; Proof of Negligence; Burden.*—An employee suing for personal injuries has the burden of showing that the negligence charged was the direct and immediate cause of the injuries complained of.
10. *Same; Evidence; Sufficiency.*—The evidence in this case examined and held insufficient to show that the obedience of the plaintiff to the orders of the engineer in control of the same, was the cause of the injuries, as is essential to a recovery under the pleading.
11. *Same; Assumption of Risk.*—A brakeman charged with the duty of sanding the track assumes the danger incident to the business of boarding the locomotive while the train was moving, in order to reach the position from which to sand the track.

APPEAL from Mobile Circuit Court.

Heard before HON. SAMUEL B. BROWNE.

Action by Robert Mills against the Creola Lumber Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

STEPHENS & LYONS, for appellant.—The 1st count was insufficient and the demurrers should have been sustained to same.—*H. A. & B. R. R. Co. v. Dusenberry*, 94 Ala. 413; *Clements v. A. G. Ry. Co.*, 127 Ala. 166.

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On the same authority the demurrer should have been sustained to count 2. This count was further defective because it fails to allege that the order or direction was negligently given.—*Dantzler v. DeBardclaben*, 101 Ala. 309; *Parker v. Bear Creek Mill Co.*, 134 Ala. 293. The demurrers to count 4 should have been sustained, as only the negligence of an employe in the immediate charge or control of some of the machines or places mentioned in subdivision 5 can render the master liable.—*L. & N. R. R. Co. v. Goss*, 137 Ala. 319; *Brown v. L. & N. R. R. Co.*, 111 Ala. 275; *L. & N. R. R. Co. v. Richardson*, 100 Ala. 232; *L. & N. R. R. Co. v. Mother-shed*, 97 Ala. 261. Plea 4 was good as a plea of contributory negligence.—*R. & D. R. R. Co. v. Birins*, 103 Ala. 164; *Burgin v. L. & N. R. R. Co.*, 97 Ala. 274. Plea B. was good.—*T. C. I. & R. R. Co. v. Herndon*, 100 Ala. 457. The court erred in permitting the question and answer as to whether or not the plaintiff had on some previous occasion gotten on the train going at a greater or less speed as at the time of the injury.—*Bir. E. Ry. Co. v. Clay*, 108 Ala. 234; *First Nat. Bank v. Chafin*, 118 Ala. 346; *Fryerson v. Fryerson*, 21 Ala. 549. The exclusion of the letter from the jury was error.—*L. & N. R. R. Co. v. Malone*, 109 Ala. 509; *Hudson v. The State*, 137 Ala. 60; *Rabb v. Brown*, 4 Hun. 797; *Clark v. Fletcher*, 1 Adam 53. The court erred in excluding the statement that the accident was the result of plaintiff's own carelessness.—*L. & N. R. R. Co. v. Hurt*, 101 Ala. 34; *Snodgrass v. Caldwell*, 90 Ala. 319; *Moore v. Crosswaithe*, 135 Ala. 272. The court's oral charge was defective.—*Dantzler v. DeBardclaben, etc.*, 101 Ala. 309. Charge 2 given for plaintiff was error.—*Stanton v. L. & N. R. R. Co.*, 91 Ala. 382; *Williams v. Woodward Iron Co.*, 106 Ala. 254; *Western Ry. v. Mutch*, 97 Ala. 194. The 3rd, 4th and 5th charges are prejudicial arguments.—*Goldsmith v. McCafferty*, 101 Ala. 663; *Cothran v. Moore*, 1 Ala. 424. Charges 12 and 13 should have been given for defendant.—*Smith v. The State*, 92 Ala. 30.

GREGORY L. & H. T. SMITH, and CHARLES L. BROMBERG, for appellee.—The court did not err in overruling

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the demurrers to the 1st and 2nd counts.—*Armstrong v. Montgomery St. R. R.*, 123 Ala. 233; *R. R. Co. v. Checwing*, 93 Ala. 31; *R. R. Co. v. Harkins*, 92 Ala. 244; *M. & O. R. R. Co. v. George*, 94 Ala. 214; *Loughran v. Brewer*, 113 Ala. 514; *Montgomery v. A. G. S.*, 97 Ala. 306; *Postal Tel. Co. v. Jones*, 133 Ala. 225; *Seaboard Mfg. Co. v. Woodson*, 94 Ala. 143. The court properly sustained the demurrers to pleas 4 and 5.—*R. R. Co. v. Miles*, 68 Ala. 268; *Armstrong v. Montgomery St. Ry. supra*; *Pac. Ry. Co. v. Hughes*, 86 Ala. 612; *Watkins v. Bir. Ry. Co.*, 120 Ala. 152; *Southern Ry. Co. v. Roebuck*, 132 Ala. 418; *B. R. & E. Co. v. Brannan*, 132 Ala. 431. Demurrers were properly sustained to plea B.—*Seaboard Mfg. Co. v. Woodson, supra*; *M. & O. R. R. Co. v. George, supra*. The court properly sustained the demurrers to plea E.—*T. C. I. & R. R. Co. v. Herndon*, 100 Ala. 456; *Johnson v. L. & N. R. R. Co.*, 104 Ala. 244. It was competent to show that plaintiffs and other persons had been in the habit of getting on and off the train in safety while moving at about the same speed.—*Railroad Co. v. Stewart*, 91 Ala. 421. The letter was properly excluded, the rule does not mean that whenever one statement of a man is introduced in evidence the other party may introduce every other statement made although written on the same sheet of paper.—*Chambliss v. The State*, 78 Ala. 468; *Woodruff v. Winston*, 68 Ala. 412; *McGee v. Mahone*, 37 Ala. 261. Self serving declarations are never admissible. The court did not err on its ruling as to the plaintiff admission. There is a distinction between an admission of law and of fact, the former being admissible and the latter not.—*Roberts v. Roberts*, 82 N. C. 29. Counsel discuss charges given and refused but cite no authority.

DENSON, J.—This is a suit by the plaintiff (appellee) against the defendant, Creola Lumber Company, a corporation, to recover damages for a personal injury suffered by him while in the defendant's employment as a brakeman. The complaint as it was originally filed contains three counts. Two counts were afterwards added by amendment. The court, at the request of the

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defendant in writing, charged the jury that the plaintiff could not recover on the third and fifth counts; so that the only assignment of error with respect to the court's rulings on the demurrers addressed to the complaint, which must be considered, are those which relate to and challenge the sufficiency of counts 1, 2, and 4 as they were last amended on the 9th day of February, 1905. After the amendment of February 9, 1905, was made to the complaint, the defendant was allowed to refile to the complaint as amended the demurrer filed December 26, 1904.

The first count is grounded on the second subdivision of section 1749 of the code of 1896. This count alleges that the defendant was engaged in operating a train propelled by steam for hauling logs near Creola, in Mobile county, and employed an engineer and fireman, and the plaintiff to operate said log train. From these allegations, in connection with subdivision 2 of section 1749 of the code of 1896, there arose a duty on the part of the defendant to the plaintiff to see to it that he was not injured by the negligence of any person, in the service of the defendant, who had superintendence intrusted to him, while in the exercise of such superintendence. —*K. C., M. & B. R. R. Co. v. Burton*, 97 Ala. 241, 12 South. 88. This count, after alleging that plaintiff was working under the engineer, Frank Driesbach, alleges that said Driesbach was intrusted by defendant with the superintendence of the operation of said log train and of the plaintiff, and that while the plaintiff was engaged in the service of defendant in operating the log train he was injured, setting forth the nature and extent of the injury. Then follows this averment, namely: "And the plaintiff avers that said injuries were caused by reason of the negligence of said engineer (Driesbach) whilst in the exercise of such superintendence aforesaid."

One insistence of the appellant is that the count does not advise the defendant whether it must defend against negligence on the part of the engineer as such, or negligence on the part of the same man in his capacity as superintendent of the plaintiff. We think this criticism of the count is without foundation, for the

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only negligence counted on is that of Driesbach in his capacity as superintendent and whilst in the exercise of such superintendence; and uncertainty as to which subdivision of the statute the first count is based on cannot be predicated of the count. It has been many times held by this court that the duty to exercise care being shown and the failure to perform that duty, "the negligence causing the injuries complained of may be well averred in the most general terms, little, if at all, short of the mere conclusions of the pleader; and this, upon the entirely sufficient consideration, among others, that if the defendant has been guilty of negligence he knows as well or better than the plaintiff can in what that negligence consisted." So there is no merit in the grounds of the demurrer raising the question of generality of averment as to negligence.—*Postal Tel. Co. v. Jones*, 133 Ala. 217, 32 South. 500, and cases there cited; *Bear Creek Mill Co. v. Parker*, 134 Ala. 293, 32 South. 700; *Seaboard Mfg. Co. v. Woodson*, 94 Ala. 143, 10 South. 87; *Illinois Car & Equipment Co. v. Walch*, 132 Ala. 490, 31 South. 470. The demurrer to the first count was properly overruled.

The second count of the complaint, after averring, substantially as was done in the first count, the relation of master and servant existing between the defendant and plaintiff, the superintendence of Driesbach, and plaintiff's injury, ascribes the injury to the negligence of Driesbach in this language; "And the plaintiff avers that said injuries were caused by reason of the negligence of said Frank Driesbach, who was in the service or employment of the defendant, and to whose orders or directions the plaintiff at the time of the injury aforesaid was bound to conform, and did conform, and said injuries resulted from his having so conformed, and whilst said Frank Driesbach was in the exercise of such superintendence aforesaid." This count is based on subdivision 3 of section 1749 of the code of 1896, and the question is whether it is sufficient as against the demurrer filed to it, which is the same demurrer as that filed to the first count. With respect to the demurrer to the second count it is insisted in the brief of appellants: First, that the count combines the allegations required

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under subdivisions 2, 3, and 5 of section 1749 of the code of 1896, and there is nothing in it to advise the defendant whether it must defend against a claim based on a negligent superintendence of the plaintiff by Driesbach, or a negligent ordering or directing of the plaintiff by the said Driesbach, or a negligent handling of his train by Driesbach. Second, that the count fails to aver what order Driesbach gave, or that the order or direction, conformance to which it is alleged caused the injury, was negligently given by Driesbach.

In respect to the first insistence it is sufficient to say that it is no objection to the count under this subdivision that it avers that the negligence complained of was that of a certain employe of the defendant, who was an engineer, and who had superintendence intrusted to him in respect to the operation of the train. This, as was said in *Kansas City, Memphis & Birmingham R. R. Co. v. Burton*, 97 Ala., at top of page 249, 12 South., at page 92, "is not the averment of different wrongs and causes of action, but merely the statement of the relations of the negligent person to the defendant." The gravamen of the count is the injury resulting from plaintiff having conformed to an order given by an employe of the defendant to whose orders plaintiff was bound to conform. The first insistence is, therefore, without merit.—*Southern Car & Foundry Co. v. Bartlett*, 137 Ala. 234, 34 South. 20. It has been determined by this court that, in a count based on subdivision 3 of section 1749, the order given and conformed to should be averred, and it should also be averred that the order was negligently given.— *Bear Creek Mill Co. v. Parker*, 134 Ala. 301, 32 South. 700; *Southern Car Co. v. Bartlett*, 137 Ala. 234, 34 South. 20; *Dantzler v. Debardeleben Coal & Iron Co.*, 101 Ala. 309, 14 South. 10, 22 L. R. A. 361. Count 2 fails in these respects, and the demurrer should have been sustained, as without the averments mentioned the count fails to state a cause of action.—*Cases supra*.

The fourth count as last amended is based on subdivision 5 of section 1749 of the code of 1896, which provides for recovery of damages sustained by personal injury, "when such injury is caused by reason of the neg-

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ligence of any person in the service or employment of the master or employer who has the charge or control of any signal, points, locomotive, engine, switch, car, or train upon a railway, or of any part of the track of a railway." The count avers that the injury "was caused by reason of the negligence of Frank Driesbach, the engineer employed by the defendant to operate said train, while so engaged in the operation thereof." It is insisted that the count fails to aver that the engineer, Driesbach, had "charge or control" of the train. It is argued that the expression "engaged in the operation thereof," used in the count, is not the equivalent of the statement that Driesbach had the "charge or control" of the train. While it would have been more direct pleading to have averred that Driesbach was in charge or control of the train, yet we think that is the only deduction to be drawn from the averments employed in the count, and the demurrer was properly overruled.

There are many pleas to the different counts of the complaint. but, following our rule with reference to omission by appellant's counsel to insist on errors assigned, we will only consider the rulings of the court on the demurrers to pleas numbered 4 and 5 and plea B. It cannot be said as a conclusion of law that under all circumstances it is negligence for an employe, a brakeman, to dismount from a moving train and attempt to get upon the locomotive propelling the train, even though the act of dismounting should be unnecessary. Plea 4 fails to set out facts which on their face show contributory negligence on the part of the plaintiff, and the demurrer was properly sustained.—*Birmingham Ry. & Elec. Co. v. Brannon*, 132 Ala. 431, 31 South. 523; *Watkins v. Birmingham Ry. & Elec. Co.*, 120 Ala. 152, 24 South. 392, 43 L. R. A. 297; *Osborne v. Ala. Steel & Wire Co.*, 135 Ala. 571, 33 South. 687.

The fifth plea is not subject to the demurrer assigned to it, and the court improperly sustained the demurrer. But issue was joined on pleas 3 and "d," and it is insisted for the appellee that these pleas set up the same, or substantially the same, defense as is set up by plea

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5, and that under them the appellant could have had full benefit of the defense set up by plea 5. We are clear in our conclusion that the insistence is not tenable with respect to plea 3. Plea "d" avers "that the plaintiff negligently placed his foot upon the railroad track of the defendant immediately in front of the wheels of a locomotive being operated thereon, and thereby suffered the injury complained of." If the plaintiff put his foot on the ground, so that it was in front of the wheels of the locomotive, as is averred in plea 5, his foot was on the track of the road, and proof that he did so place his foot would have been competent evidence under plea "d." In other words, it cannot be said that the rails of a railroad of themselves constitute the track, irrespective of the ground between the rails and between the ends of the cross-ties. Therefore we are of the opinion that the defendant, under plea "d," was entitled to prove the defense as set up by plea 5, and the action of the court in sustaining the demurrer to plea 5 is error without injury.

Plea B is in this language: "That plaintiff contributed proximately to the injury complained of, in that he negligently attempted to get upon the locomotive of defendant while the same was in motion." "To withstand an appropriate demurrer, the plea of contributory negligence must go beyond averring negligence as a conclusion, and must aver a state of facts to which the law attaches that conclusion."—*Osborne v. Ala. Steel & Wire Co.*, 135 Ala. 571, 33 South. 687. The expression in the plea "that he negligently attempted" is but the conclusion of the pleader, and the facts averred in connection with it are not such as the law attaches the conclusion of negligence to. The demurrer was properly sustained to plea B.

Issue was joined on the general issue, and special pleas 3, "c," "d," "i," and "k." At the time the plaintiff received the injury complained of, he was a brakeman in the employ of the defendant on a log train of the defendant, which consisted of a small-g geared locomotive and two skeleton cars loaded with saw logs. The two cars were in front of and were being pushed by the locomotive. This train was used for the purpose of car-



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rying cars over the spur tracks to and from the main line and making up trains. Frank Driesbach was the engineer in charge of the train. Driesbach had control of the train and the plaintiff. The fireman was James Gaillard, who died before the trial of the case. The engine had no apparatus attached to it for sanding the track, but a bucket of sand was kept on the board or platform extending around both sides of the boiler. As described by one of the witnesses, this board or framework around the boiler made it appear as though the boiler was set into a flat car, and was called by the witnesses the "sanding board" or "running board." It extended across the front of the engine, and from 6 to 8 inches above the rail. There was suspended by iron stirrups another board, about 10 inches wide, extending from 10 to 12 inches outside of the rail at each end, known as the "foot board." Whenever the engineer desired the track to be sanded, he would cause the brakeman to sit upon the sanding board at the front of the engine, and with his hand throw or sprinkle sand on the rail. As to when and how the brakeman would be caused to take such position there is some conflict in the evidence. Instead of the cars having vertical brake rods, the same were attached horizontally to the end of the car, one end reaching near the center of the car, at which place the brake chain was attached to it, and the other end extending to the outside of the car, where there was an appliance for turning this brake rod and thereby tightening the brakes by using a ratchet fixed there and an implement called a "flunkie," which, from the description given of it, appears to be a large wrench. To apply or release the brakes, the train had to stop. The plaintiff had been employed as a regular brakeman on this road for about a month before the accident. His job prior to that time had been that of trackman on the same road for more than a year. During this period he had served frequently as an extra trainman. He was injured on the 2d day of April, 1904, and immediately before his injury he was riding upon one of the cars of logs which was being pushed by the locomotive. The train at the time was descending a long grade. While the train was in motion, the plain-

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tiff left the car, got on the ground, and waited until the engine came opposite to where he was standing, and he attempted to get on the engine. His foot slipped under the wheel and was cut off across the instep. There was a number of signals, understood amongst the trainmen operating the road. One of these signals was several quick, short blasts from the whistle of the locomotive, which indicated that the brakemen should pay attention to and heed the engineer.

Concerning the facts above recited there is no dispute in the evidence. In addition to the understood facts, the plaintiff, who was the only witness in his own behalf, testified that on the morning of the accident, when they were about 150 feet from the bottom of the grade, the engineer gave the signal of two or three short blasts of the whistle, and when the plaintiff looked back the engineer gave him the sam sign that he always gave him to put sand on the track, and the plaintiff then got off the train, and went back to where the sand was, and took hold of the rod of the running board, and his foot slipped between the footboard and the tender trucks, under the engine, and was cut off. He testified the train was running downgrade, and it did not look "anyways" too dangerous to catch it, and it seemed that it needed sand before getting at the steepest part of the grade; that such was the reason that he made back at the time; that it didn't look "overly fast"—not too fast to catch. He testified, on cross-examination, that he did not know positively how fast the train was going at the time, but to his judgment about eight miles an hour; that it was noways too fast or dangerous for him to catch it at the time. He also testified that, when he looked back to the engineer, the sign which the engineer gave him was by pointing his finger forward and downward, and then it was he got off the train, that being the sign the engineer usually gave him to sand the track, and at that time the train was 150 feet from the bottom of the grade and was running in an "ordinary sort of way"; that the track was wet, and none of the brakes were on. The foregoing evidence has been carefully and attentively considered. It is the only evidence in the case that the plaintiff can rely on for recovery.

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The burden rested upon the plaintiff to prove to the reasonable satisfaction of the jury that the negligence charged was the direct and immediate efficient cause of his injury. As was said in *Western Ry. of Ala. v. Mutch*, 97 Ala. 196, 11 South. 894, 21 L. R. A. 316, 38 Am. St. Rep. 179, quoting from 16 Am. & Eng. Ency. Law, p. 436: "To constitute actionable negligence, there must be not only causal connection between the negligence complained of and the injury suffered, but the connection must be by natural and unbroken sequence—without intervening efficient causes—so that, but for the negligence of the defendant, the injury would not have occurred. It must not only be a cause, but it must be the proximate—that is, the direct and immediate—efficient cause of the injury."—*Decatur Car Wheel Co. v. Mcchaffey*, 128 Ala. 242, 29 South. 646; *L. & N. R. R. Co. v. Quick*, 125 Ala. 561, 28 South. 14; *Ritter-Conley Mfg. Co. v. Hamlin*, 144 Ala. 192, 40 South. 288; *Richards v. Sloss-Shoffield Steel & Iron Co.*, 146 Ala. 254, 41 South. 288. There is nothing in the evidence to show or justify the inference that the giving of the alleged order by Driesbach was the proximate cause of the injury complained of. We have seen the plaintiff testified that he "lay hold" of the rod on the running board, and his foot slipped between the foot-board and the tender trucks, under the engine, and was cut off. And this is all there is in the evidence tending to show how the accident came about, its causes, etc. There is no explanation at all as to what caused his foot to slip, or why it slipped. The slipping of the foot could not be referred to the order, or to the speed of the train; for there is no evidence that the movement of the train had anything to do with causing his foot to slip. Furthermore, plaintiff testified that the train was not going at such rate of speed as to make it dangerous for him to board the same; and he had frequently boarded the locomotive and sanded the track before. If this be true, how can it be said that the order given to sand the track was negligently given? On the other hand, if it was dangerous to board the locomotive, moving at the rate it was, certainly the danger was open and obvious,

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and there is no pretense that the plaintiff was incapable of recognizing and appreciating such danger as is incident to climbing or attempting to climb upon a moving locomotive. Climbing on the locomotive to reach the position for sanding the track was shown by the evidence to be a part of and within the duties of his employment, and the dangers attendant thereupon were natural and incidental to the business itself, and the master owes him no duty as to these risks. The servant assumed them.

So upon the evidence our conclusion is that the plaintiff failed to make a case for recovery under any count of the complaint, and the defendant was entitled to have given to the jury the general affirmative charge with hypothesis, as was requested by it. The foregoing conclusion renders it unnecessary for us to consider other assignments of error relating to the refusal of charges requested by the defendant and charges given for the plaintiff. It is also unnecessary to consider the numerous assignments relating to the rulings of the court on the admissibility of evidence. We make no comments on the assignment which presents for review the action of the court in requesting plaintiff's counsel to "draft a charge such as he thought would be appropriate to the case as made by the pleadings and evidence." But, in adopting this course, we must not be understood as approving the action of the court in that respect.

The judgment of the circuit court is reversed, and the cause is remanded.

Reversed and remanded.

TYSON, C. J., and HARALSON and SIMPSON, JJ., Concur.

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## Ala. City, G. & A. Ry. Co. v. Bates.

### *Damages for Injury to Passengers.*

(Decided Feb. 14, 1907. 43 So. Rep. 98.)

1. *Carriers; Injury to Passengers; Evidence; Burden of Proof.*—The burden is on the plaintiff to show that he was a passenger, in an action for injuries alleged to have occurred while plaintiff was boarding one of defendant's cars, at a regular stopping place for the reception of passengers.
2. *Same; Instructions; Who are Passengers.*—An instruction defining a passenger "as one who is boarding a car, or attempting to board a car, or at the station of a company operating a car for the purpose of being carried on the car from one point to another" and the further statement therein that "he becomes a passenger, when, with the intention of boarding a train, he attempts to board for the purpose of riding," is erroneous, in premitting all enquiry of acceptance as such by the carrier.
3. *Trial; Instructions; Ignoring Defenses; Permitting Recovery for Causes not Counted on.*—The complaint alleging that the injury occurred while the plaintiff was boarding one of defendant's cars while the car was stationary at a regular stopping place for the reception of passengers, and was caused by the defendant negligently putting the car in motion when plaintiff was in a perilous position; and the defense being the general issue, and contributory negligence in attempting to board the car while in motion, in front of a trunk or box near defendants' track resulting in plaintiff's having run into the trunk or box causing the injury complained of, it was erroneous to instruct the jury that if there were two proximate and concurring causes at the time of the injury "for instance, if there was negligence in moving the car by the conductor when plaintiff attempted to board it, if that was negligent, if that was one of the causes, and if there was a trunk or box here, and that was another cause, and if both these causes, contributed to the injury, still plaintiff can recover, because he is not cut off by the fact of the box being there; as it ignores the plea of contributory negligence, and permits recovery for cause not alleged.
4. *Carriers; Injury to Passengers; Instructions; Sudden Danger.*—An instruction asserting that "one brought into sudden danger

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by the wrong of another is not expected to act with coolness and deliberation as would a reasonable man under ordinary circumstances," is erroneous in predicating, as matter of law, lack of coolness upon merely sudden danger, however slight, as distinguished from extreme danger.

APPEAL from Etowah Circuit Court.

Heard before Hon. W. W. HARALSON.

Action by Perryman Bates against the Alabama City, Gadsden & Attalla Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

BURNETT, HOOD & MURPHEE, for appellant.—Where the evidence is conflicting it is reversible error to fail or refuse to charge on contributory negligence when that issue is raised.—*Memphis St. Ry. Co. v. Newman*, 69 S. W. 269; *Davidson v. Metropolitan St. Ry.*, 75 N. Y. App. Div. 426. The court erred in its definition of what is a passenger.—*N. Bir. Ry. Co. v. Liddicoat*, 99 Ala. 549; *O'Hara v. St. Louis Transit Co.*, 76 S. W. 680; *Farley v. C. H. & D. R. R. Co.*, 108 Fed. 16 and cases there cited; *Indiana Ry. Co. v. Hudson*, 74 Am. Dec. 256. Where error is shown the presumption of injury arises and must be clearly repelled by the record or the judgment will be reversed.—*Moody v. McGowan*, 39 Ala. 586; 2 Mayf. 129. The case of *Southern Ry. Co. v. Johnson*, 39 South. is almost on all-fours with this case and the court's attention is invited to it and the cases there cited. Counsel discuss charges given and refused but cite no authority.

GOODHUE & BLACKWOOD, and HOWARD & HUNT, for appellee.—Counsel discuss assignments of error but cite no authority.

TYSON, C. J.—This case was tried upon the fourth count of the complaint, which was added by amendment. The plaintiff's injuries are alleged to have occurred while he was in the act of boarding one of defendant's cars as a passenger, while the car was stationary at a regular stopping place for the reception of pas-

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sengers, and to have been caused by the negligent act of defendant in putting the car in motion when he was in a position that rendered it perilous to do so, thereby causing him to be violently thrown down, etc. The defendant's pleas were the general issue and contributory negligence. The contributory negligence alleged was: First, that plaintiff negligently attempted to board the car, while it was in motion, in front of a trunk near defendant's track, and while thus attempting to board said car he ran over or against said trunk, which caused him to fall, etc.; second, that plaintiff took hold of a handhold fastened to said car, and after said car was placed in motion, and while still holding on to said handhold, negligently walked along by the side of the car, keeping pace with it, when he ran over or against a trunk that was near defendant's railway track, which caused his fall; and, third, that plaintiff negligently attempted to board said car, while it was in motion, in front of a trunk standing on a platform near defendant's track, and while walking along by the side of said car on said platform, and just before plaintiff reached said trunk, he turned and looked away from the direction of said trunk, whereupon he ran over or against said trunk, which caused him to fall, etc.

We have set out the pleadings in detail and with particularity, in order that the issues of fact presented by them may be readily seen. It is scarcely necessary to say that the burden of proof was upon the plaintiff to establish every material allegation of his complaint. If he failed to show that he was a passenger at the time of his injury, or if that relation between him and the company is shown, and his injuries were caused other than by the negligent act of defendant in putting the car in motion, he was not entitled to recover. In other words, if he was not a passenger at the time he received his injuries, or if he was a passenger and his injuries were caused by his falling over the trunk, which was on the platform, in his attempt to board the car while it was in motion, then he has failed to prove the allegations of his complaint, and cannot recover. Of course, if the defendant proved either of its pleas of contributory negligence, this would defeat the plaintiff's action,

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One of the contested issues of fact upon the trial was whether the plaintiff was a passenger. The general principles applicable and controlling in the solution of the question under the pleadings and evidence in this case may be stated to be these: A passenger may be defined to be one who undertakes, with the consent of the carrier, to travel in a conveyance furnished by the latter, otherwise than in the service of the carrier as such.—Shearman & Red. on Neg. § 488. The relation of carrier and passenger is dependent upon the existence of a contract of carriage, express or implied, between the carrier and passenger, made by themselves or their respective agents; and this relation begins when a person puts himself in the care of the carrier or directly within its control, with the bona fide intention of becoming a passenger, and is accepted as such by the carrier. There is, however, seldom any formal act of delivery of the passenger's person into the care of the carrier, or of acceptance by the carrier of one who presents himself for transportation; hence, the existence of the relation is generally to be implied from the attendant circumstances. But it is undoubtedly the rule that these circumstances must be such as will warrant the implication that one has offered himself to be carried and the offer has been accepted by the carrier. And this, of course, necessarily involves the existence of the fact that the person must signify his intention to take passage either by words or conduct, and those in charge of the car must assent by words or conduct to his becoming a passenger.—*North Birmingham R. R. Co. v. Liddicoat*, 99 Ala. 545, 13 South. 18; *O'Mara v. St. Louis Transit Co.*, 76 S. W., 680, 102 Mo. App. 202; *Farley v. C., H. & D. R. Co.*, 108 Fed. 14, 47 C. C. A. 156; *Webster v. Railway Co.*, 161 Mass. 298, 37 N. E. 165, 24 L. R. A. 521; *Ill. Central R. R. v. O'Keefe*, 61 Am. St. Rep. 68, 168 Ill. 115, 48 N. E. 294, 39 L. R. A. 148; *Elliott on R. R. § 1578*; 3 Wood on R. R. p. 1205; 5 Am. & Eng. Ency. Law, pp. 486-489, and cases cited in note; *Nellis on St. R. R. Accident Law*, pp. 39-43.

We need only apply these principles to see that the trial court, in his oral charge to the jury, erred in the definition given them of a passenger, to which an ex-



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ception was reserved, which was in this language: "A passenger is one who is boarding a car, or who is attempting to board a car, or at the station of a company operating a car, for the purpose of being carried on the cars from one point to another." And likewise in the statement: "He becomes a passenger when, with the intention of boarding a train, he attempts to board for the purpose of riding." There was also an exception to this language of the oral charge: "That if there were two causes of an injury, two proximate concurrent causes, and each contributes proximately to the injury, why, then, action can be maintained against either." And to this language: "Well, now, if there were two proximate concurrent causes there at the time of the injury to Mr. Bates, for instance, if there was negligence in the moving of the car by the conductor when he attempted to board it, if that was negligence, if that was one of the causes, and if there was a trunk or box or other obstacle there, and that was another cause, and if both of these causes in your judgment contributed to the injury, why, then, still plaintiff can recover, because plaintiff is not cut off by the fact of the box being there." It is clear this instruction ignored the defense of contributory negligence, as well as permitted a recovery for causes of injury not counted on in the complaint.

There were many other rulings to which exceptions were reserved, and many charges refused to defendant, but what we have said will doubtless suffice for another trial, save, perhaps, charge numbered 42, given at plaintiff's request. That charge is in this language: "The court charges the jury that one brought into sudden danger by the wrong of another is not expected to act with coolness and deliberation as moved a reasonable man under ordinary circumstances." It was doubtless the purpose of the charge to obtain the benefit of the principle: "Where by the negligence of the defendant, or those for whom he is responsible, the plaintiff has been suddenly placed in a position of extreme peril, and thereupon does an act which, under the circumstances known to him, he might reasonably think proper, but which those who have a knowledge of all the facts, and time to consider them, are able to see

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was not in fact the best, the defendant cannot insist that under the circumstances the plaintiff has been guilty of negligence."—*Central of Ga. Ry. v. Foshee*, 125 Ala. 215, 27 South. 1006. It needs no comment to show that the charge does not correctly assert the principle. It will be noted that it attempted to predicate as matter of law lack of coolness and deliberation upon merely "sudden danger," however slight that danger might have been, to say nothing of other vicious infirmities.—*Birmingham Ry. & Elec. Co. v. Butler*, 135 Ala. 388, 33 South. 33; *L. & R. R. Co. v. Thorton*, 117 Ala. 274-282, 23 South. 778.

Reversed and remanded.

HARALSON, SIMPSON, and DENSON, JJ., concur.

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*Action for Damages for Injuries Resulting from Failure to Receive Plaintiff as a Passenger.*

(Decided Dec. 20, 1906. 42 So. Rep. 821.)

1. *Carriers; Existence of Relation of Passenger and Carrier; Pleading.*—A complaint containing allegations that defendant was a common carrier of passengers by means of electric cars running from G. to B.; that plaintiff and her children were at G. at the proper place there for receiving passengers, for the purpose of being transported by means of such car from G. to B.; that the car stopped at said place for the purpose of receiving passengers, but plaintiff did not board it by reason of the negligence of the servant of defendant in charge of the car in negligently failing to allow her a reasonable time or opportunity to do so, aside from the positive allegations therein contained that plaintiff and her children were defendant's passengers, and that it was its duty to transport them from G. to B., sufficiently shows the relation of carrier and passenger.
2. *Same; Wanton Injury; Pleading.*—A complaint, after alleging

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that the servant of defendant in charge of the car negligently failed to allow plaintiff a reasonable time or opportunity to board the car, averred that defendant's servant in charge of the car, while acting in the line and scope of his authority as such servant, wantonly or intentionally prevented plaintiff from boarding said car as aforesaid, and thereby wantonly or intentionally caused said plaintiff to suffer said injuries. Held, sufficient to charge wantonness or intentional injury.

3. *Appeal; Review; Discretion; Competency of Immature Witness.*—Unless it clearly appears that the court's discretion was improperly used in permitting a witness of immature years to testify, it will not be reviewed on appeal.
4. *Trial; Motion to Exclude Evidence.*—Where there was no objection to the question or the answer thereto, and the evidence was relevant, a motion made to exclude such evidence, made at the close of the defendant's testimony, comes too late.
5. *Damages; Right to Punitive Damages; Instructions.*—An instruction authorizing punitive damages if the act was done negligently, intentionally or wantonly, is improper; such damages not being recoverable for simple negligence.

#### APPEAL from Birmingham City Court.

Heard before Hon. C. W. FERGUSON.

Action by Mollie Wise against the Birmingham Railway, Light & Power Company. Judgment for plaintiff. Defendant appeals. Reversed and Remanded.

This is an action by one offering herself as a passenger of defendant for a failure on part of the defendant to carry her and her minor children from one point upon the line of defendant's street railway to another point on said line. The complaint contained two counts, as follows:

"(1) The plaintiff claims of the defendant five thousand dollars, for that heretofore, to-wit, on the 18th day of November, 1903, defendant was a common carrier of passengers for hire and reward from Gate City to Birmingham, in Jefferson county, Alabama, by means of a car operated by electricity upon a railway running from said Gate City to said Birmingham, and plaintiff and her said children were defendant's passengers, and it was the duty of defendant to carry them on said car from said Gate City to said Birmingham, as aforesaid; that on said day plaintiff, with her baby of tender years

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in her arms and several other children with her, was at said Gate City, at the proper place used by defendant for receiving passengers on said car, for the purpose of boarding said car and being carried by said car as its passenger from said Gate City to said Birmingham; that said car stopped at said Gate City for the purpose of receiving passengers, and while same was stopped as aforesaid some of plaintiff's said children boarded said car, but plaintiff, with her said baby and another or others of said children, did not board said car, and as a proximate consequence thereof plaintiff was exposed to the cold and inclement weather for a long time, and suffered great mental and physical pain, and great inconvenience, was compelled to wait for a long time without shelter from the cold and inclement weather, and was made sore and sick, and was put to great trouble, inconvenience, and expense in or about her efforts to protect herself and her said baby from the cold and inclement weather, and in and about getting to said Birmingham, and in and about her efforts to heal her said sickness and soreness. Plaintiff alleges that she did not board said car, and she suffered said injuries and damages as aforesaid, by reason and as a proximate consequence of the negligence of the defendant's servant or agent in charge or control of the car, in this, viz: Said servant or agent, while acting within the line and scope of his authority as such, negligently failed to allow plaintiff a reasonable time or opportunity to board said car."

(2) Same as the first count down to the words "heal her said sickness and soreness," and adding: "Plaintiff further avers that defendant's servant or agent in control or charge of said car, while acting within the line and scope of his authority as such agent or servant, wantonly or intentionally prevented plaintiff, with her said baby, from boarding said car as aforesaid, and thereby wantonly or intentionally caused plaintiff to suffer said injuries and damages."

Demurrers were interposed as follows:

To first count: "Averments are too vague, indefinite, and uncertain. It does not appear therefrom where, in or how the defendant's servant or agent negligently

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failed to allow plaintiff a reasonable opportunity to board said car. It avers but the conclusions of the pleader. No facts are therein alleged showing wherein the defendant violated any duty owing to plaintiff. For that it does not appear therefrom that plaintiff was a passenger on defendant's car. For that it does not appear that plaintiff had paid her fare as a passenger. For that no facts are therein averred showing that defendant owed plaintiff any duty." To second count: "For that it does not appear therefrom how or in what manner said servant or agent wantonly or intentionally prevented plaintiff from boarding said car. For that no facts are averred therein showing a wanton or intentional injury to plaintiff. For that no facts are therein averred which put defendant on notice as to what acts of misconduct are relied on."

These demurrers being overruled, the defendant pleaded the general issue and the contributory negligence of the defendant in negligently failing to board the car while the same had stopped at said place in the complaint alleged.

Dixie Wise was introduced as a witness, and testified that he was seven years old; did not know when he was seven; did not know "what that meant when I held up my hand and swore to speak the truth a while ago. I know the difference between a lie and the truth. I do not know what you will do with a little boy if he tells a lie. If he dies after telling a lie, I do not know what will become of him. I go to Sunday school when mama will let me. I always tell the truth. Bad boys, when they tell lies, go to the bad man. It would be wrong to tell a lie after you have sworn to tell the truth, and if I were to tell a lie after I had sworn to tell the truth I would go to the bad man."

The charges requested by the defendant and refused by the court are as follows:

Charges 1, 2, and 3 were affirmative charges. "(4) The jury are not authorized to find from the evidence that the defendant's conductor wantonly or intentionally started the car from the stopping place at Gate City before the plaintiff and some of her children boarded the car. (5) In considering the question

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whether or not the jury will award punitive damages on the defendant the jury may consider the fact, if they find it to be a fact from the evidence, that the defendant's conductor or its other agent who is charged with wantonness or willfulness was not present in court to testify on its behalf. (6) If the jury should find for the plaintiff, they cannot award any damages to plaintiff to compensate her for any sickness the jury believe from the evidence she suffered, and which was due to her exposure at the station while waiting until the car that she went to Birmingham on arrived at Gate City."

There was verdict and judgment for the plaintiff in the sum of \$425. Application for new trial was made because the damages awarded were excessive, and because the court improperly instructed the jury after the jury had retired and when they had returned into open court and stated that they could not agree upon a verdict.

TILLMAN, GRUBB, BRADLEY & MORROW, for appellant.—Counsel discuss assignments of error but cite no authorities.

BOWMAN, HARSH & BEDDOW, for appellee.—The 1st and 2nd counts as amended were not subject to the demurrers interposed.—*Armstrong v. Montgomery St. Ry.*, 123 Ala. 244; *Russell v. Huntsville Ry. Co.*, 137 Ala. 628. The question of competency in an infant witness is for the court and only a gross abuse of discretion will be reviewed.—*Beason v. The State*, 72 Ala. 194; 21 S. W. 604; 64 N. C. 601; 102 Mo. 288; 3 N. J. Law, 202; 47 Ga. 524. A child over seven is not prima facie incompetent to testify.—*Wade v. The State*, 50 Ala. 164; *Kelly v. The State*, 75 Ala. 21; *McGuff v. The State*, 88 Ala. 150. The plaintiff was a passenger.—Booth on Street Railways, § 326; Nellis' Street Surface Railways, page 446. Counsel discuss other assignments of error but cite no authorities.

HARALSON, J.—The demurrer to the first count is sought to be sustained on the ground that the count

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does not show that the relation of carrier and passenger existed at the time of the grievance complained of. The count as amended, alleges in terms, that "plaintiff and her children were defendant's passengers and it was the duty of defendant to carry them on said car from Gate City (the initial station) to said Birmingham as aforesaid." The second count contains the same averment. The circumstances stated in the counts, aside from the positive averment of the relation of carrier and passenger, were sufficient to create that relation.—5 Am. & Eng. Ency. Law (2d Ed.) 488, 491, and notes; Hutchinson on Carriers, §§ 558, 562.

2. The second count avers, "that defendant's servant or agent in charge or control of said car, while acting within the line and scope of his authority as such servant or agent, wantonly or intentionally prevented plaintiff with her said baby from boarding said car as aforesaid, and thereby wantonly or intentionally caused plaintiff to suffer said injuries and damage." This was a sufficient averment to save the count from the ground of demurrer, that the count does not show that the injury complained of was wantonly or intentionally "inflicted."—*Russell v. Huntsville Railway, Light & Power Co.*, 137 Ala. 628, 34 South. 855; *C. of G. R. Co. v. Foshee*, 125 Ala. 226, 27 South. 1006; *Armstrong v. Montgomery St. Ry. Co.*, 123 Ala. 244, 26 South. 349.

3. There was no reversible error in the ruling allowing the seven year old boy, Dixie Wise, to testify. In passing on the competency of a witness of tender years, much must necessarily be left to the discretion of the presiding judge, and this discretion will not be revised unless it clearly appears that it has been improperly exercised.—*Wade v. State*, 50 Ala. 164; *Kelly v. State*, 75 Ala. 22, 51 Am. Rep. 422; *McGuff v. State*, 88 Ala. 147, 7 South. 35, 16 Am. St. Rep. 25.

4. The witness, H. J. Palmer, testified that when the car stopped at Gate City, there were seven or eight or ten passengers to alight, before Mrs. Wise and her party, consisting of herself and nine children, who were in waiting to get on the car, could get aboard. After her daughter, Mrs. Palmer, and Mrs. Wise's little son,

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Alfred, and one or two of the children, got on the car, the witness testified, that he saw the conductor in the act of pulling the bell cord, and protested, asking him not to move the car until the rest of the party got on, when he answered that he did not have time, and the car proceeded around the loop, leaving Mrs. Wise and the others of her children, standing there; that he asked the conductor again, to stop and let the mother and her children get on the car with the ones that were already on, and he said he did not have time, but did stop about a third of a mile away, and put the children off, who were on the car. Again he testified, that Mrs. Wise followed the car around the loop, and he asked the conductor to stop and put the children off with their mother, who was following the car, and he said he did not have time, and witness then asked him, to let the mother and her three children get on, and he replied he did not have time, and went on about two blocks and stopped and put the children off.

5. The defendant, after it had introduced its testimony, moved the court to exclude that part of the evidence about what the conductor said or did at the place where the loop comes into the main line. It does not appear that the question calling for the evidence was objected to, nor was the answer objected to after it was made. The evidence tends to show a wanton disregard of plaintiff's rights, and a willingness to inflict any consequent injury on her that might follow such disregard of her rights.

6. The court in its general instructions, charged among other things: "Now the allegation of the complaint is that these parties were acting within the line and scope of their employment, if so, and either one or both of them negligently, intentionally or wantonly as I have described wantonness to you, failed to allow her to board the car, then you may inflict what is called punitive, exemplary or vindictive damages."

This instruction, in the alternative, charges simple negligence and wantonness, either one or the other. This is an averment, that either a negligent, or an intentional or wanton failure to allow plaintiff to board the car, was sufficient to authorize punitive damages.



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This was error.—*L. & N. R. R. Co. v. Duncan*, 137 Ala. 454, 34 South. 988; *L. & N. R. R. Co. v. Markee*, 103 Ala. 160, 15 South. 511, 49 Am. St. Rep. 521; *L. & N. R. R. Co. v. Hurt*, 101 Ala. 35, 13 South. 130. Punitive damages are not recoverable for simple negligence, but the recovery in such case is for compensatory damages.—5 Mayfield's Dig. p. 263, § 4; *B. R. L. & P. Co. v. Nolan*, 134 Ala. 332, 32 South. 715; *A. G. S. R. R. Co. v. Sellers*, 93 Ala. 9, 9 South. 375, 30 Am. St. Rep. 17.

7. We have examined charges requested by defendant and refused, and find no reversible error in their refusal.

For the error above pointed out, the judgment of the court is reversed and the cause remanded.

Reversed and remanded.

TYSON, C. J., and SIMPSON and DENSON, JJ., concur.

## Hess v. Birmingham Railway, Light & Power Company.

*Action by Passenger for Damages for Personal Injury.*

(Decided Nov. 29th, 1906. 42 So. Rep. 595.)

1. *Limitation of Actions; Commencement of Action; Amendment to Complaint; New Cause of Action.*—The original complaint placed the injury as occurring on the line of defendant's railway running from B. to W. at or near B., and charged the negligence to be that of the defendant. The amendment alleged the injury to have occurred at or near B. on defendant's line of railway running from B. to E., and alleged the negligence to the defendant's servant or agent, acting within the line and scope of his authority as such. Held, not to state a new or different cause of action, and that the amendment related back to the filing of the original complaint, and was not barred by statute of limitations of one year.
2. *Same.*—A count in wanton or wilful conduct, alleging the negligence in the defendant, was a count in trespass, and an amendment changing the allegation of negligence in the de-

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defendant to the negligence of the defendant's servant or agent, acting within the line and scope of his employment as such, made the count one in case, and was a departure from the count as originally filed, did not relate back, and was subject to the statute of limitation of one year.

APPEAL from Jefferson Circuit Court.

Heard before Hon. A. A. COLEMAN.

Action by George P. Hess against the Birmingham Railway, Light & Power Company for personal injuries. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

The complaint in this cause, as originally filed, contained two counts, as follows: Count 1: "Plaintiff claims of the defendant \$5,000 as damages, for that heretofore, to-wit, on the 24th day of January, 1903, defendant was a common carrier of passengers over and along a railway running from Birmingham to Woodlawn, Jefferson county, Alabama, by means of a car operated by electricity; that on said day, while plaintiff was on said car, being carried by defendant as its passenger on said car, said car collided with another car at a point on said railway in or near said Birmingham, and as a proximate consequence thereof plaintiff was (here follows a detailed description of his injuries and special damages.) And plaintiff alleges that said car, upon which he was as aforesaid, collided with said other car, and plaintiff suffered said injuries and damages, by reason and as a proximate consequence of the negligence of defendant in or about carrying plaintiff as its passenger as aforesaid." Count 2 was the same as count 1, down to and through the allegation of injuries and special damages, and adds the following: "Plaintiff avers that defendant wantonly or intentionally caused plaintiff to suffer said injuries and damages as aforesaid by wantonly or intentionally causing or allowing said collision." Demurrers were interposed to these counts, but no action on demurrers is shown by the record. The original complaint was filed on the 24th of March, 1903. On the 18th of October, 1904, the plaintiff by leave of the court amended his complaint as follows: (1) He amends each count of the complaint

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by striking therefrom the word "Woodlawn," where it appears in the complaint, and by inserting in lieu thereof the words "West End." (2) By striking from the first count the word "defendant," where it last occurs in said county, and by inserting in lieu thereof the words "defendant's servant or agent, acting within the line and scope of his authority as such." (3) By striking from the first count of the complaint the word "its," where it last occurs in said count, and by inserting in lieu thereof the word "defendant's." (4) By striking from the second count the word "defendant," where it last occurs therein, and inserting in lieu thereof the words "defendant's servant or agent, acting within the line and scope of his authority as such." Defendant moved to strike the first and second counts of the complaint as amended on the grounds of a departure, a change of cause of action, and because not within the *lis pendens* of the original suit. These motions being overruled, the defendant pleaded the general issue and the statute of limitations of one year to the amended complaint. At the request of the defendant, after the evidence had been given, the court gave the general affirmative charge.

BOWMAN, HARSH & BEDDOW, for appellant.—The affirmative charge should not have been given to the 1st count. The amendment to the count does not introduce a new claim or cause of action.—*Nelson v. First National Bank*, 139 Ala. 578; *L. & N. R. R. Co. v. Woods*, 105 Ala. 561; *A. G. S. R. R. Co. v. Chapman*, 83 Ala. 453; *Manchester Fire Ins. Co. v. Fiebleman*, 118 Ala. 322; *Chicago, St. Louis Ins. P. P. R. Co. v. Billis*, 118 Ind. 221; *Adams v. Phillips*, 75 Ala. 461; *A. G. S. R. R. Co. v. Thomas & Sons*, 89 Ala. 304; *Ageo v. Williams*, 30 Ala. 639; *Bradford v. Edwards*, 32 Ala. 631; *McDonald v. State of Nebraska*, 41 C. C. A. 283; *Evans v. Richardson*, 76 Ala. 332; *Stringer v. Waters*, 63 Ala. 561; *John F. Kuhn v. J. H. Brownfield*, 11 L. R. A. 700; *Ross v. State*, 131 Ind. 548; *W. U. T. Co. v. Way*, 83 Ala. 553; *Dowling v. Blackman*, 70 Ala. 304; *Sublett v. Hodges*, 88 Ala. 491; *Birmingham Fur. & Mfg. Co. v. Gross*, 97 Ala. 222; 1 Ency. Plea. & Prac. 821 and au-

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thorities cited; *Ricketts v. Weedan*, 64 Ala. 548; *Bradford v. Edwards*, 32 Ala. 628.

The amendment to the 2nd count was within the lis pendens.—*Shepherd v. Furniss*, 19 Ala. 760; *Rhodes v. Roberts*, 1 Stew. 145; *Bay Shore R. R. Co. v. Harris*, 67 Ala. 8.

TILLMAN, GRUBB, BRADLEY & MORROW, for appellee.—Counsel discuss assignments of error but cite no authority.

DOWDELL, J.—The complaint contained two counts, both of which, subsequent to the filing, were amended. The only question presented is whether by the amendment a new claim or new cause of action was introduced into the complaint, to which the statute of limitation might be pleaded as a defense. The first count of the complaint was in case, and the description of the locus in quo of the alleged injury placed it on the line of the defendant's railway running from Birmingham to Woodlawn, and "in or near said Birmingham." The amendment to this count, in the description of the locus in quo, averred it to be on the defendant's line of railway running from Birmingham to West End; the only change being to insert "West End" for "Woodlawn." The amendment also changed the word "defendant," as it last occurred in the first count, to the words "defendant's servant or agent, acting within the line and scope of his authority as such," and by changing the word "its," where last occurring in the count, to the word "defendant's."

The question here raised was carefully considered by this court in the case of *Nelson v. First National Bank*, 139 Ala. 578, 36 South. 707, 101 Am. St. Rep. 52. Under the principles laid down in that case, and on the authorities there cited, we are of the opinion that the amendment of the first count in the case before us did not introduce a new claim or new cause of action, but falls within that character or class of amendments which relate back to the commencement of the suit, and therefore not subject to the plea of the statute of limitations. In the first place, an averment of the precise

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place of the alleged injury was not essential to the statement of a good and sufficient cause of action. The particular place of the alleged injury of the plaintiff while a passenger, by the negligence of the defendant, borrowed no part of the cause of action, nor did it enter as an element in the claim sued on. As suggested in the argument by counsel, when the change made by the amendment is tested, "the wrong complained of is the same, the injury inflicted is the same, the manner of its infliction is the same, plaintiff's and defendant's status is the same, defendant's duty to the plaintiff is the same, and its violation the same," and, it may be added, the evidence required to support the claim or cause of action remained the same in character. There is no pretense that there was but the one claim, the one cause of action, the one alleged wrong and injury. Indeed, the plea as filed in substance admits this. The identity of the claim or cause of action under these circumstances was not destroyed or lost by a mere change in the description of the locality of the happening of the alleged wrong and injury. The effect wrought by the amendment of the second count, however, was different, under the doctrine laid down in *Nelson v. Bank*, *supra*. The second count, as originally filed, under the decision in *City Delivery Co. v. Henry*, 139 Ala. 161, 34 South. 389, and the cases following that one, was in trespass, and the amendment to this count converted it to one in case. This introduced into the complaint a new and different cause of action from that stated in the second count as originally filed, which did not relate back to the commencement of the suit, and was consequently subject to the plea of the statute of limitations.

The trial court, on the theory that the amendment of the first count introduced a new claim, being subject to the defendant's plea of the statute of limitation, gave the general charge for the defendant. In this the court was in error, and for this error the judgment must be reversed and the cause remanded.

Reversed and remanded.

TYSON, C. J., and ANDERSON and McCLELLAN, JJ.,  
concur.

[Birmingham Railway, Light & Power Co. v. King.]

## Birmingham Railway, Light & Power Co. v. King.

*Action for Injuries to Passenger.*

(Decided Nov. 27th, 1906. 42 So. Rep. 612.)

1. *Carriers; Injury to Passenger; Complaint; Sufficiency.*—A complaint which alleges that the defendant was a common carrier operating an electric car line, and that plaintiff was a passenger thereon for hire, that on reaching the station the car stopped and while plaintiff was in the act of alighting the car moved off suddenly throwing plaintiff to the ground and severely injuring him, and that said injuries were proximately caused by the negligence of the defendant's employe in charge of the car, in the management thereof, is not subject to demurrer as being vague and uncertain, and not stating facts showing negligence of defendant's employe, or in what they were negligent, or that they were negligent in the line of their employment. Count two charging the negligence to the motorman in the operation of the car and count three charging negligence to the conductor, on the same allegations of facts as count one, are neither subject to such demurrer.
2. *Witness; Examination; Answer; Responsiveness.*—It is not error to exclude the answer of a witness which is not responsive to the question propounded.
3. *Appeal; Review; Harmless Error.*—If it was error to exclude an answer of a witness, this error was cured by the subsequent admission of testimony substantially covering the testimony excluded.
4. *Trial; Instructions; Construction.*—In passing upon the oral charge of the court, where portions thereof are excepted to, the charge must be construed as a whole.
5. *Carriers; Injury to Passengers; Instructions.*—The court instructed the jury that if the car was suddenly jerked forward while plaintiff was alighting, she could recover, unless guilty of contributory negligence. The court modified this charge by instructions to the jury that the defendant did not owe plaintiff the absolute duty to deliver him safely that they were not insurers—absolute insurers—of the safety of passengers, but they owed the passengers the highest degree of care to deliver them safely. As modified, the instruction was correct.

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6. *Trial; Instruction; Argumentative Instruction.*—An instruction asked as an answer to argument of counsel, asserting that defendant had no absolute right to have the plaintiff examined to determine the extent of the injuries, was an argument and properly refused.
7. *Same; Misleading Instructions.*—Instructions misleading in their tendencies are properly refused.

APPEAL from Birmingham City Court.

Heard before Hon. C. W. FERGUSON.

Action by Queenie King against the Birmingham Railway, Light & Power Company. Judgment for plaintiff, and defendant appeals. Affirmed.

The complaint contained three counts, as follows:  
Count 1: "Plaintiff claims of the defendant the sum of \$25,000 damages, for that on and prior to the 7th day of September, 1903, the defendant was a body corporate, and as such was engaged in the business of a common carrier, and in and about its business was operating electric cars for the carriage of passengers from Birmingham to East Lake, Ala., one of its lines passing a station called 'Fifty-Ninth Street Station,' which was a regular stopping place for receiving and discharging passengers; and the plaintiff avers that on the said 7th day of September, 1903, the plaintiff was a passenger on one of its said cars going from Birmingham to said Fifty-Ninth Street Station, and upon reaching said Fifty-Ninth Street Station, the said car upon which plaintiff was riding stopped, and the plaintiff attempted to alight from said car at said point, but while she was in the act of alighting, and before she had alighted from said car, the same moved forward quickly, jerking the plaintiff down upon the ground, and severely injuring her in the hips, back, spine, side and other portions of her body, and greatly impairing her nervous system, from which she has suffered great pain and mental torture. (Here follows other allegations of special damages.) And plaintiff avers that her said injuries were proximately caused by the negligence of defendant's employes in charge of said car in the management and operation thereof." Count 2: Same as count 1, except that the negligence alleged is charged to the motorman

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in charge of said car in the management and operation thereof. Count 3: Same as first count, except that the negligence is charged to the conductor in charge of said car in the management and operation thereof.

The defendant filed the following demurrers, and assigned the same to each count of the complaint separately: "(1) The averments of said count are vague, uncertain, and indefinite. (2) No facts are stated showing wherein the defendant's employes, servants, or agents were guilty of negligence, (3) It does not appear therefrom how or in what manner said employes were negligent. (4) It does not appear therefrom that said employes were negligent in the doing of an act within the line and scope of their employment as such." These demurrers being overruled, the defendant filed a plea of the general issue and three special pleas of contributory negligence, in the first of which her negligence is alleged to consist of the negligent manner in which she stepped from the car while same was in motion. (2) It is alleged that plaintiff negligently attempted to alight from said car while it was in motion. In the third, her negligence is alleged to consist in negligently alighting from said car while the same was in motion, after having been warned or notified not to alight from said car.

Upon entering into the trial, the plaintiff demanded a struck jury. The court asked the 24 jurors in attendance the usual qualifying questions, all of which were answered in the proper way, whereupon plaintiff's counsel requested the court to inquire of the jurors whether any of them was in the employment of the defendant company. The court did so, and one of the jurors answered that he was employed as a motorman by the defendant company. The plaintiff interposed a challenge for cause as to said juror, upon the ground solely that he was in the employment of the company. The court sustained the ground, and for cause set aside said juror, and substituted for him in the proper way one Baggett, who was stricken from the panel by the defendant. Objection was interposed to the action of the court in reference to this juror by the defendant.



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The evidence for the plaintiff is not set out in the record. The tendencies are stated to be that on the day mentioned in the complaint the plaintiff was a passenger on one of the electric cars that the defendant was operating from Birmingham to East Lake, it being Labor Day; that her destination was as stated in the complaint; that the car came to a stop at the Fifty-Ninth Street Station, and the plaintiff immediately got up and went out upon the platform to alight from it, and was in the act of alighting from the step of the platform, and was on the step, when the car, which was standing still up to that time, started with a hard jerk, which threw her to the ground and injured her as stated in the complaint. The tendencies of the evidence as introduced by the defendant was that the car stopped at Fifty-Ninth Street Station the usual length of time for cars to stop there for passengers to get on and off; that after all the passengers who were attempting to get off had alighted from the car in safety while it was standing, the conductor gave the motorman the signal to go ahead; that, after the signal was given, plaintiff came out of the door of the car and started to get off, when the conductor called to her not to get off, stating that he would stop the car again, but she continued to cross the platform and get down on the step while the car was moving slowly.

While J. A. Emery was being examined by defendant, this question was asked him by defendant's counsel: "How did the car start with reference to how it should be started?" referring to the starting of the car at the time the plaintiff was injured. Witness answered as follows: "Heavy trains like that always start slowly." Objection by the plaintiff was interposed and sustained by the court to the answer. Afterwards the defendant asked the witness: "How did this particular train start?" and the witness answered, "Slowly." The witness was asked the further question whether or not it was started as trains of that kind usually are, and witness answered in the affirmative. Dr. Mason testified that at the time of the trial he was surgeon for the defendant, and that he had had no opportunity to examine the plaintiff, and knew nothing as to the extent of

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her injuries or condition. Dr. Legrand testified that he was defendant's surgeon at the time plaintiff was hurt, and he examined her just after the accident.

The oral charge of the court is not set out in full in the transcript. The portion excepted to was as follows: "Gentlemen, one of the allegations of the complaint is that she was a passenger on defendant's car. If you are reasonably satisfied from the evidence that she was a passenger, then the moment that she took passage on the car it became the duty of the defendant company to deliver her safely to the point where she intended to get off. If they failed in that, and she was negligently injured in any one of the ways averred in the complaint, by the means averred in the complaint, the defendant would be liable in damages, unless the defendant makes good its pleas of contributory negligence." Then follows the charge as to contributory negligence. The defendant also objected to the oral charge of the court, wherein he instructed the jury that, if the car was suddenly jerked forward quickly when plaintiff was in the act of alighting, then she would be entitled to recover, unless she was guilty of contributory negligence which proximately contributed to her injury. The court thereupon modified its charge by saying to the jury that the defendant company did not owe her the absolute duty to deliver her safely there; that they were not insurers—absolute insurers—of the safety of passengers; but that they owed to the passengers the highest degree of care in delivering them safely at the point of destination. The defendant requested the following written charge, which was refused: "The defendant had no absolute right to have the plaintiff examined for the purpose of determining the extent of her injuries."

There was verdict and judgment for the plaintiff in the sum of \$4,000. From this, this appeal is prosecuted.

TILLMAN, GRUBB, BRADLEY & MORROW, for appellant.—Counsel discuss assignments of error, 1 to 6 inclusive, but cite no authority. The court erred in sustaining a challenge for cause to the juror because he was employed as a motorman by the defendant.—*Burdine v. Grand Lodge*, 37 Ala. 478; *Calhoun v. Hannon*, 87 Ala. 277.

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The court erred in refusing to charge that defendant had no absolute right to have plaintiff examined for the purpose of determining the extent of her injuries.—*A. G. S. Ry. Co. v. Hill*, 90 Ala. 76.

A. O. LANE, for appellee.—None of the demurrers to the complaint were well taken.—5 Mayfield, 74. The oral charge of the court when taken as a whole correctly states the law and the rule is that it must be construed as a whole and in connection with the evidence.—*Decatur C. W. & Mfg. Co. v. Mehaffey*, 128 Ala. 256; *M. & E. R. R. Co. v. Stewart*, 91 Ala. 422. The court properly allowed the juror motorman to be challenged for cause.—*Steed v. Knowles*, 97 Ala. 578; *N. O. & T. R. R. Co. v. Mosk*, 2 South. 360; *Thomas v. The State*, 133 Ala. 144; *Gunter v. Granterville Mfg. Co.*, 18 S. C. 263; *Central of Ga. Ry. Co. v. Mitchell*, 63 Ga. 173; *Rollins v. Ames*, 9 Am. Dec. 79. The court properly refused the charge requested by the defendant.—*A. G. S. Ry. Co. v. Hill*, 90 Ala. 71, s. c. 93 Ala. 571.

DOWDELL, J.—The complaint was sufficient, and not open to the demurrer interposed.—5 Mayfield's Dig. p. 754, § 74.

There was no error in excluding the answer of the witness Emery that "heavy trains like that always start slowly." In the first place, the answer was not responsive to the question asked. In the second place, if there was error, it was error without injury, as the subsequent testimony of this witness was in substance and effect the same as the statement which had been excluded.

That part of the oral charge of the court excepted to by the defendant, and which is made the basis of assignment numbered 5, was free from error. The defendant's contention is that it ignored a phase of the defendant's evidence. The part excepted to, when taken in connection with other parts of the oral charge—and the charge must be taken as a whole (*Decatur Car Wheel & Mfg. Co. v. Mehaffey*, 128 Ala. 256, 29 South. 646)—was unobjectionable.

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The part excepted to, and made the basis of assignment numbered 6, was, after exception taken, modified by the court, and, as so modified, was relieved of the objectionable feature insisted on in argument.

The juror challenged by the plaintiff was at the time in the employment of the defendant company as a motorman. The court committed no error in allowing the challenge. What was said in *Thomas v. State*, 133 Ala. 139, 32 South. 250, as to the qualifications of jurors and the right of challenge for cause, is applicable here.

There was no error in refusing the written charge requested for the defendant. It was argumentative, and was asked, as indicated in brief of counsel for defendant, for the purpose of answering an argument made by plaintiff's counsel to the jury. Moreover, the charge, if not directly opposed to the case of *Ala. G. S. R. R. Co. v. Hill*, 90 Ala. 71, 8 South. 99, 9 L. R. A. 442, 24 Am. St. Rep. 764; was, to say the least, under the principle laid down in that case, misleading. The bill of exceptions does not purport to set out all the evidence, and it may be that the right of the defendant to have the plaintiff examined by an expert surgeon was such that a denial of it by the court, if it had been requested, would have been reversible error.

We find no error in the record, and the judgment will be affirmed.

Affirmed.

TYSON, C. J., and ANDERSON and McCLELLAN, JJ., concur.

[Montgomery Traction Company v. Fitzpatrick.]

## Montgomery Traction Company v. Fitzpatrick.

### *Damages for Ejection of Passenger From Car.*

(Decided Feb. 14th, 1907. 43 So. Rep. 136.)

1. *Pleading; Amendment.*—Under the statute an amendment which does not work an entire change of parties, or introduce a new cause of action, is allowable.
2. *Pleading; Amendment; Declaration; Carrier; Ejection of Passenger.*—The complaint originally alleged that plaintiff was wrongfully ejected from defendant's car, and the amendment allowed was a count alleging that while a passenger on defendant's car, plaintiff applied to defendant's conductor for a transfer to another line of cars of defendant, and was given a transfer so negligently torn off that it could not be used, and by reason thereof would not be received, and by reason thereof plaintiff was ejected from said other car. Held, properly allowed.
3. *Carriers; Ejection of Passengers; Complaint; Sufficiency.*—The complaint was not demurrable, although plaintiff was not entitled to recover for a wrongful ejection, as he had a right of action for a breach of the contract to carry, or for defendant's negligence in not issuing proper transfer.
4. *Same; Election of Remedies.*—The fact that plaintiff might have sued for a breach of the contract of carriage, did not preclude him from suing in case for negligence.
5. *Same; Designation of Servant.*—A complaint alleging that owing to the negligence of the conductor in issuing the transfer, plaintiff, a passenger, upon tendering such transfer to a conductor on another of defendant's cars, was ejected therefrom by the conductor thereof, sufficiently designates the servant or conductor, without naming him.
6. *Evidence; Res Gestae.*—One of the defendant's witnesses having testified that the transfers were cut by a mechanical appliance, which always cuts a straight edge, it was competent to introduce in evidence a transfer issued simultaneously with that issued to plaintiff, as part of the res gestae to show how the transfer would have appeared if properly cut and to aid in determining how it was torn; it appearing that such transfer was issued to a companion of plaintiff at the time plaintiff's was issued.

[Montgomery Traction Company v. Fitzpatrick.]

APPEAL from Montgomery City Court.

Heard before Hon. A. D. SAYRE.

Action by P. Fitzpatrick against the Montgomery Traction Company. Judgment for plaintiff, and defendant appeals. Affirmed.

RUSHTON & COLEMAN, for appellant.—A complaint cannot be amended by adding a new count which either changes the form of action or introduces an entirely new cause of action.—*Mahan v. Smitherman*, 71 Ala. 56; *Ala. Gt. Southern R. R. Co. v. Smith*, 81 Ala. 229; *Louisville & Nashville R. R. Co. v. Woods*, 105 Ala. 561; *Cent. of Ga. Ry. Co. v. Foshee*, 125 Ala. 199; *Holland v. Southern Express Co.*, 114 Ala. 128; *Springfield Fire & Marine Ins. Co. v. DeJarnette*, 111 Ala. 248; *Tenn. & Coosa R. R. Co. v. Danford & Armstrong*, 112 Ala. 80.

The face of a ticket is the conclusive evidence to a conductor of the terms of the contract of carriage between passenger and company; and if it shows that passenger is not entitled to continue on trip, the conductor can expel or eject him from train or car in proper manner.—*K. C. M. & B. R. R. Co. v. Foster*, 134 Ala. 244-256-7 and authorities; *McGee & Frick v. Reynolds*, 117 Ala. 413, 419-21 and authorities; *S. & N. A. R. R. Co. v. Huffman*, 76 Ala. 492; *Manning v. L. & N. R. R. Co.*, 95 Ala. 392-394; *A. G. S. R. R. Co. v. Carmichael*, 90 Ala. 19; *Commonwealth v. Power*, 7 Metcalf 596; 41 Am. Dec. 465, note 476-7; *McGhee v. Drisdale*, 111 Ala. 597; *Poulin v. Canadian R. R. Co.*, 6 U. S. App. 298; 3 C. C. A. 23, 17 L. R. A. 800; *Hufford v. Grand R. & I. R. R. Co.*, 53 Mich. 118; *McKay v. Ohio R. Co.*, 34 W. Va. 65; 9 L. R. A. 132; *Yorton v. Milwaukee &c. R. Co.*, 54 Wis. 234; 41 Am. Rep. 23; *West Maryland R. Co. v. Stockdale*, 83 Md. 245; *McGhee & Fink v. Cashin*, 40 So. Rep. 63. Transfers show contract, and unless authorize passage, no liability for ejection by conductor on second car.—*Keane v. Detroit Elec. R. Co.*, 123 Mich. 247, 81 N. W. Rep. 1084; *Bradshaw v. South Boston R. Co.*, 135 Mass. 407; 46 Am. Rep. 481-483 and note; *Kiley v. Chicago City R. Co.*, 189 Ill. 384; 52 L. R. A., 626, 627; *Garrison v. United R. &c. Co.*, 94 Md. 347; *v. Connor*, 78 N. E. 376; *Nellis' St. Ry. Law*, p. 83.

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MARK D. BRAINARD, for appellee.—The case should be affirmed on the following authorities.—*Georgia R. & E. Co. v. Baker*, 54 S. E. 639; *Cleveland City R. R. Co. v. Connor*, 78 N. E. 376; *Nellis' St. Ry.* Lew, p. 83.

SIMPSON, J.—This was an action by the appellee (plaintiff) against the appellant (defendant). The complaint originally had but one count, which claimed damages because the plaintiff "was \* \* \* wrongfully ejected therefrom (that is, from defendant's street car) by the company's conductor, motorman, servant, or agent in charge of said car." This complaint was amended, by adding a count alleging that plaintiff was a passenger on the defendant's "Electric Park car"; that he paid his fare and applied to the conductor for a transfer for himself and friend to go out on the Court Street car; that the motorman of said "Electric Park car" gave him the transfer ticket, and he did not notice it until it was presented to the Court Street conductor; that the conductor on the Electric Park car had, in tearing off the transfer, negligently or carelessly torn it, so that the same could not be used to enable him to take a continuous trip; and that said conductor on said Court Street car "did eject plaintiff therefrom by reason of said transfer being so negligently torn." The defendant objected to the filing of said amendment, moving to strike it, and also demurred to it, all of which the court overruled.

It is insisted by the appellant that this was a departure from the cause of action as alleged in the original count. Our statute on the subject of amendments is very liberal, and the construction placed upon it by this court is that any amendment may be allowed which does not make an entire change of parties or an entirely new cause of action.—*Central of Ga. Ry. v. Foshee*, 125 Ala. 199, 222, 225, 27 South. 1006; *Mohr v. Lemle*, 69 Ala. 180, 182, 183; *Crimm's Adm'r v. Crawford*, 29 Ala. 626. In the *Mohr Case*, *supra*, stress is laid upon the fact that, although the libel charged in the original complaint attacked the solvency only of the plaintiff, and the one in the amendment touched his integrity, yet

[Montgomery Traction Company v. Fitzpatrick.]

the form of the action remained the same. In the *Foshee Case*, *supra*, the court says: "So long as counts added by amendment set up the same general transactions or occurrences upon which the original complaint relief for recovery, they do not introduce an entirely new cause of action, and are not objectionable, though the form of action may be changed by them, as from trover to case, or vice versa, or from case to trespass," etc. And the court says that the cases cited "differentiate the rule of amendments prescribed by the statute as construed by this court from the rule against departures."—Page 335 of 125 Ala., page 1015 of 27 South. Under the latest construction of said section we hold that the count added by amendment was not such a departure as would authorize the court to refuse to allow it, or to strike it out. The cases cited which treat of the effect of an amendment on the statute of limitations, of course, raise an entirely different question.

For the same reason there was no error in the overruling of the demurrers to said second count. While it may be admitted that the weight of authority is that the conductor must rely entirely on the ticket in determining his action, and the Court Street conductor could not be guilty of a wrong for ejecting a passenger who did not produce a proper transfer (*Hutchinson on Carriers*, §§ 574, 580; 4 Elliott on R. R. § 1594; *Kiley v. Chicago City*, *etc.*, 189 Ill. 384, 59 N. E. 794, 52 L. R. A. 626, 82 Am. St. Rep. 460; *Garrison v. United Ry. Co.*, 97 Md. 347, 25 Atl. 371, 99 Am. St. Rep. 452; *Bradshaw v. So. Boston R. Co.*, 135 Mass. 407, 46 Am. Rep. 481; *Keen v. Detroit Elec. Ry. Co.*, 81 N. W. 1084, 123 Mich. 247; *K. C. M. & B. R. R. Co. v. Foster*, 134 Ala. 244, 32 South. 773, 92 Am. St. Rep. 25), yet all of the authorities recognize that, while in such case there may not be a right of recovery on the ground of a wrongful ejection, yet there can be a recovery for the failure to fulfill the contract to carry, or for the negligence of the agent in giving the wrong ticket or transfer. The gravamen of the second count is the negligence of the conductor on the Electric Park car in tearing the transfer, and the ejection is averred merely as the result of such negligence. The fact that the plaintiff might have sued for



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a breach of the contract of carriage did not deprive him of the right to sue in case for the negligence.—*Sou. Ry. v. Jones*, 132 Ala. 437, 443, 31 South. 501. The conductor on said car is sufficiently designated, without giving his name.

It is next insisted that the court erred in overruling the objections to the introduction in evidence of the transfer which was issued to plaintiff's companion at the same time. Both tickets were paid for at the same time by the plaintiff, and, in addition, the testimony of the defendant's employes was that these tickets were cut by a mechanical appliance, which always cut a straight edge. So it was material to admit the other transfer to show how the appliance cut the ticket. It was competent, as a part of the *res gestae*, to show how the ticket would have appeared, if properly cut, and, as a circumstance to aid in the determination of the point, as to how it was torn.

The judgment of the court is affirmed.

TYSON, C. J., and HARALSON and DENSON, JJ., concur.

## **Loveman v. Birmingham R'y L. & P. Co**

### *Damages for Personal Injury to Person on Track.*

(Decided March 2, 1907. 43 So. Rep. 411).

1. *Executors and Administrators; Settlement of Claim; Authority; Plea.*—A plea alleging that the administrator settled the claim sued on is not subject to demurrer for failure to allege that the administrator received a reasonable amount in satisfaction of the claim and that settlement was authorized by the court, since sec. 138, Code 1896, does not prohibit an administrator from settling such claim without authority from the court.
2. *Release; Pleading; Sufficiency.*—A plea which alleges that a certain sum was paid by the defendant to the administrator who accepted the same in full discharge of the cause of action alleged is sufficient as a plea of release.

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3. *Names; Identity.*—The identity of the administrator, the intestate and of the cause of action being shown a release was properly admitted in evidence in which the name of the deceased was given as "Laurine Schulern," although the action was by the administrator of Laurine Schuler.
4. *Evidence; Opinion Evidence; Competency.*—A question which goes beyond the fact testified to by the witness and predicates his opinion on other matters, calling for the opinion of a witness as to the mental condition of the person is improper.
5. *Release; Pleading; Issues; Evidence; Admissibility.*—The plea was a settlement with the administratrix of the deceased; the replication alleged that the settlement was fraudulent and the administratrix incompetent to make it. Held, that to prove the averments of the replication it is competent to show that the defendant had, before the settlement, offered to settle with witness, as attorney for a much larger sum, which fact was communicated to the administratrix before the settlement; but not competent evidence on the issue of the liability of defendant.
6. *Appeal; Harmless Error.*—The jury having found for the defendant it was error without injury to instruct that if defendant was not grossly at fault the jury would be justified in assessing the damages as low as one dollar; although under sections 26 and 27, Code 1896, the jury might assess such damages as to them might seem just though the negligence was not gross.
7. *Same; Instructions.*—The trial court will not be reversed for giving instructions asserting no proposition of law.
8. *Trial; Argumentative Instructions.*—An instruction asserting that it was the policy of the law to favor private settlements; and one asserting that the jury would not be justified in finding that the administratrix conspired to defraud her grandchild merely because they believed that she was not of sound mind, are argumentative and might properly have been refused; the issue being whether the settlement was fraudulent and whether the administratrix was competent to make it.
9. *Same; Misleading Instructions.*—A charge asserting that the jury would not be justified in finding that the release was not the act of the administratrix, unless they were reasonably satisfied not only that she was mentally weak but that she was mentally unsound, and that she did not at the time comprehend the release on account of such mental unsoundness; and one asserting that the amount paid in settlement of the release was immaterial unless the jury were convinced that the administratrix did not have sufficient mental capacity to make

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the settlement, or that she conspired with defendant to defraud the distributees of the estate; and another asserting that the law does not recognize mere mental weakness as incapacitating a person to make a contract, are each misleading, the issues being the competency of the administratrix to execute the release, and whether or not it was fraudulent to execute it.

10. *Same; Ignoring Evidence.*—The issue being whether a release was valid and there being evidence of the mental incapacity of the administratrix, a charge asserting that the legality of the settlement did not depend on the amount paid therefor, but that the law recognized the right to settle on such terms as they considered fair was erroneous as ignoring the evidence in the case.
11. *Same.*—An instruction asserting that there was no evidence that a representative of defendant besought the administratrix to make a settlement or attempted to prevail on her to make it was erroneous as invading the province of the jury and ignoring evidence.
12. *Same; Argumentative Instructions.*—An instruction is argumentative which asserts that the jury might consider, in determining whether the husband of the administratrix objected to the settlement, that he went alone to the office of the representative of defendant, that he witnessed the settlement and ratified it and took no steps to avoid it until he was sent for by attorneys; so also is one asserting that the jury in determining whether the administratrix entered into a conspiracy with defendant to defraud the distributees of the estate, might consider that the administratrix was a grandmother of the distributees, and that they lived with her and were supported by her and her husband.
13. *Same; Invading Province of Jury.*—An instruction asserting that the undisputed testimony showed that the administratrix executed a release on account of the death of decedent for a certain sum paid to her by defendant invaded the province of the jury; as did one asserting that the law presumed that the administratrix was of sound mind and capable of executing the release.
14. *Same.*—A charge asserting that on account of the release the jury must find the verdict for the defendant, unless each juror was satisfied that administratrix and defendant colluded to the fraud the distributees, or that she was so mentally unsound as not to understand the nature of the release, not only exacts a too high degree of proof but is misleading.

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15. *Same; Weighting Testimony; Duty of Jury.*—A charge that the jury is not bound to accept as true the testimony of any witness if they are reasonably satisfied of its truth, and in weighing the testimony of the witnesses the jury are expected to view the evidence in the light of their common sense and experience is erroneous; as is a charge calling the jury's attention to testimony without referring the credibility thereof to them.
16. *Same; Argumentative Instructions.*—An instruction that the jury in determining whether the administratrix was so mentally unsound as to be incapable of making the release, might consider the fact that she talked with her husband about her settlement before she agreed to make it and that she talked with others after making the settlement was argumentative and properly refused.

APPEAL from Jefferson Circuit Court.

Heard before Hon. A. A. COLEMAN.

Action by Izora Griffin, administrator of Laurine Schuler, against the Birmingham Railway, Light & Power Company, revived in the name of Morris Loveman, appointed administrator de bonis non on the death of Izora Griffin. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

There were four counts in the complaint, all charging simple negligence except the third, which charged wanton or willful misconduct. The defendant filed demurrers to all the counts, which were overruled; and then filed a number of pleas, including the general issue and contributory negligence, and pleas 5 and 6, which are as follows: "(5) And the defendant, for further answer to each and every count of the complaint separately and severally, says that after the institution of this suit by Izora Griffin as administrator de bonis non, this defendant on the 11th day of August, and while the said Izora Griffin was the said administratrix de bonis non of said estate, paid to the said Izora Griffin as such administratrix the sum of \$500, which the said Izora Griffin as such administratrix then and there accepted in full settlement, satisfaction, and discharge of the cause of action alleged. (6) And the defendant, for further answer to said complaint, and to each and every count thereof separately and severally, says that after the in-

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stitution of this suit by the said Izora Griffin as administratrix de bonis non of said estate, and while she was such administratrix, she executed and delivered to this defendant, in consideration of \$500 paid by this defendant to the said Izora Griffin as such administratrix, an instrument in writing in words and figures as follows: 'State of Alabama, Jefferson County: Know all men by these presents, that I, Izora Griffin, as administratrix of the estate of Laurine Schulern, deceased, in consideration of \$500 to me in hand paid as such administratrix by the Birmingham Railway, Light & Power Company, the receipt whereof is hereby acknowledged, do hereby release and forever discharge the said Birmingham Railway, Light & Power Company from all liabilities, claims, demands, and damages whatsoever accruing to me as such administratrix by reason of injury to and death of my said intestate, which are by me, in a certain suit instituted by me against the Birmingham Railway, Light & Power Company in the circuit court of Jefferson county, alleged to have been caused on, to-wit, the 23d day of May, 1903, by negligent operation of one of the street cars of the said Birmingham Railway, Light & Power Company. In consideration of the premises I do hereby authorize and empower the Birmingham Railway, Light & Power Company, its officers, agents and attorneys, to have said suit hereinbefore referred to and now pending in said circuit court dismissed. Signed and sealed on August 11, 1904.'

To these pleas the plaintiff interposed the following demurrers: To plea 5: "Because said plea shows that said Izora Griffin was acting in her representative capacity as administratrix of said estate, and fails to aver or show that said amount of \$500 was a fair or reasonable amount to be paid by defendant or to be received by said administratrix in full settlement, satisfaction, and discharge of said cause of action; and said plea fails to aver or show that said settlement is authorized or ratified by a court of competent jurisdiction." To the sixth plea, the grounds assigned to the fifth, with the additional grounds: "Said plea does not show that said instrument in writing constituted any contract between said administratrix and defendant. The plea fails to

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show accord and satisfaction of the claim sued on in this case. For aught that appears in said plea, said instrument may have been delivered for some other purpose than as a settlement of this cause of action." These demurrers being overruled, the plaintiff filed a replication to these pleas, No. 3, which is as follows: "Plaintiff says that the value of the claim sued on was greatly in excess of said amount of \$500, and was several times said amount, all of which was known to said defendant and to said Izora Griffin; but, notwithstanding said knowledge of defendant and said Izora Griffin, they fraudulently colluded together to defraud the distributees of said estate, and in pursuance of said fraudulent collusion said \$500 was paid and accepted in satisfaction of said claim, and plaintiff says that no part of said \$500 has come into his hands." There was also replication denying under oath the execution of the instrument set out.

The case was tried on its merits, as well as on the questions set forward in pleas 5 and 6 and in the replication thereto. It was proposed to show by the witness Bowman that as an attorney for plaintiff in the cause, and before the settlement made with Mrs. Griffin, the company had offered to pay the said Bowman \$2,000 in settlement of the claim, and that this offer came from Mr. Avant, who was claim agent or law agent of the Birmingham Railway, Light & Power Company. On objection to this evidence, the court refused to permit it to go to the jury. And it was further offered to show by the same witness that, before Mrs. Griffin is alleged to have executed this paper, Bowman had communicated to her the \$2,000 offer of settlement or compromise. Soon after the settlement referred to above Mrs. Griffin died, and Morris Loveman was appointed administrator de bonis non, and the suit revived in his name. There was some evidence tending to show that Mrs. Griffin was not in her right mind at the time of the execution of the accord and satisfaction. There was also evidence tending to show that the release and accord was executed by her, and that at the time it was executed she not only understood it, but that she also insisted that the funeral expenses of the intestate be paid by the company

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and that the company take care of the other expenses. There was a conflict in the testimony as to whether the servants of the defendant were at fault in the operation of the car that killed the intestate; the tendency of the plaintiff's evidence being that no signals were given and that the motorman in charge of the car was looking back into the car, and continued to do so until just before the car struck the child, while the tendency of the defendant's evidence was that the child was playing on the curb, and just as the car approached ran in front of the car, so close that the car could not be checked in time to avoid striking it. It was admitted that Mrs. Griffin collected the \$500 check and that the company paid the funeral expenses.

The court, at the request of the defendant, gave the following written charges:

"(1) There is no evidence that Capt. Wier was the agent or representative of the defendant in effecting the settlement."

"(3) There is no evidence in the case that the defendant bribed, or attempted to bribe, its witnesses."

"(9) It is the policy of the law to discourage litigation, and to favor and encourage the private settlements of disputes."

"(13) The only damages recoverable for the death of Laurine Schuler were such damages as the jury might, in their sound discretion, assess by way of punishing the defendant for causing her death. The law furnishes no rule for the measurement of damages in such a case, and the jury would be justified in assessing only such damages as the jury would regard as a just punishment; and, if the jury believe from the evidence that the defendant's agents were not grossly at fault, the jury would be justified in assessing the damages as low as \$1, if they believe such damages a sufficient punishment."

"(14) The jury will not be justified in finding that Mrs. Griffin conspired to defraud her grandchildren, merely because they believe she was of sound mind."

"(17) The jury will not be justified in finding that the release is not the act and deed of Mrs. Griffin, unless they are reasonably satisfied from the evidence, not only that she was mentally weak, but also that she was

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mentally unsound, and that she did not, at the time of the execution of the release, understand and comprehend the release on account of such mental unsoundness.

"(18) The law does not recognize the mere mental weakness or mere lack of mental clearness as incapacitating a person to make a contract."

"(20) There is no evidence that Capt. Weir had any selfish interest in making the settlement."

"(23) The legality of the settlement does not depend on the amount paid in settlement. The law recognizes the right of parties to settle on such terms as they consider fair."

"(20) There is no evidence in this case that any agent, officer, or representative of the defendant besought Mrs. Griffin to make the settlement, or attempted in any manner to prevail upon her, or to persuade her to make the settlement."

"(30) In determining whether or not Mr. Griffin objected to the settlement, the jury may consider the fact, if they believe it to be a fact, that he went alone to Capt. Weir's office and requested him to send for an agent of the company, and also the further fact, if they believe it to be a fact, that he witnessed the settlement and ratified and confirmed it in writing, and the further fact, if they believe it to be a fact, that he made no complaint of the settlement and took no steps to avoid it until he was sent for by the lawyers."

"(35) The amount paid in settlement of the claim is immaterial, regardless of whether you consider the amount large or small, unless you are reasonably convinced that Mrs. Griffin did not have sufficient mental capacity to make the settlement, or that she conspired with the defendant to defraud the distributees of the estate.

"(36) I charge you, gentlemen of the jury, that the undisputed testimony shows that Izora Griffin, as administratrix de bonis non of the estate of Laurine Schuler, deceased, executed a release to the defendant of all damages recoverable on account of the death of said Laurine Schuler, on account of \$500 paid to her by the defendant.



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"(37 The law presumes that Izora Griffin was of sound mind and that she was capable of making the contract or release in evidence."

"(39) I charge you, gentlemen of the jury, that the undisputed testimony shows that Izora Griffin, as administratrix de bonis non of the estate of Laurine Schuler, deceased, executed a release to defendant of all damages recoverable on account of the death of said Laurine Schuler in consideration of \$500 paid to her by the defendant. And I charge you, further, that although you may believe that the defendant was liable in damages on account of the death of Laurine Schuler, you must, on account of the execution of said release and the payment of said sum of money, find a verdict for the defendant, unless the jury and each member of the jury are reasonably satisfied from the evidence that the said Izora Griffin and the defendant fraudulently colluded together to defraud the distributees of the estate of Laurine Schuler, or that the said Izora Griffin was, at the time of the execution of such release, so mentally unsound as that she did not understand and comprehend the nature and effect of said release. And I charge you, further, that the burden is on the plaintiff to reasonably satisfy the jury, by a preponderance of the evidence, either that there was such collusion or mental unsoundness.

"(40) The jury are not bound to accept as true the testimony of any witness, if they are not reasonably convinced of its truth. And in weighing the testimony of witnesses and in deciding cases the jury are expected to view the evidence in the light of their experience and common sense."

"(45) In determining whether or not Mrs. Griffin entered into a conspiracy with the defendant to defraud the distributees of Laurine Schuler's estate, the jury may consider that Mrs. Griffin was the grandmother of the distributees, that the distributees lived with her and had lived with her for four years, that the distributees were supported by her and her husband, and that she (Mrs. Griffin) was in her last illness.

"(46) In determining whether or not Mrs. Griffin was so mentally unsound as to be incapable of making

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the contract of release, the jury may consider the facts that she talked with her husband many times about the settlement before she agreed to make it, and may consider the fact, if they believe it to be a fact, that she put the money in her purse.

"(47) In determining whether or not Mrs. Griffin was so mentally unsound as to be incapable of making the contract of release, the jury may consider the fact that she talked with her husband many times about the settlement before she agreed to make it, and may consider the fact, if they believe it to be a fact, that she told Mrs. Sholl shortly afterwards that she had made the settlement."

"(49) In determining whether or not Mrs. Griffin was so mentally unsound as to be incapable of making the contract of release, the jury may consider the fact that she talked with her husband many times about the settlement before she agreed to make it.

"(50) In determining whether or not Mrs. Griffin was so mentally unsound as to be incapable of making the contract of release, the jury may consider the fact that she talked with her husband many times about the settlement before she agreed to make it, and may consider the fact, if they believe it to be a fact, that she declined to execute the contract, unless the defendant would agree to pay the funeral expenses of the child."

BOWMAN, HARSH & BEDDOW, for appellant.—The 6th plea does not state a good defense and the demurrer should have been sustained thereto.—*Fish v. Miller*, 5 Paige (N. Y.) 26. The court improperly sustained demurrers to several of plaintiff's replications to defendant's 5th and 6th pleas.—*Falconio v. Larsen*, 37 L. R. A. 267; *Watkins v. Brant*, 46 Wis. 419. The name Laurine Schuler is not idem sonans with Laurine Schuler.—*Leith v. The State*, 132 Ala. 26; *Noble v. The State*, 139 Ala. 90; *Kirk v. Suttle*, 6 Ala. 681; *Oates v. Clendenard*, 87 Ala. 734; *Jacobs v. The State*, 61 Ala. 488. The names not being idem sonans the release should not have been admitted in evidence.—*Jones v. Peebles*, 130 Ala. 269; *Warner-Smiley Co. v. Cooper*, 131 Ala. 297; *B. R. & P. Co. v. Brannon*, 132 Ala. 431; *Gober v. The*

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*State.* The witness was competent to give his opinion as to whether Mrs. Griffin was in her right mind and should have been allowed to do so.—*Ford v. The State*, 71 Ala. 397; 5 Mayfield Digest p. 534. It was permissible for plaintiff to show that shortly before the settlement in question defendant had offered to settle this claim with plaintiff's attorney for \$2,000.00 and that the offer had been declined.—*Bussin v. Milwaukee R. R. Co.*, 56 Wis. 335; *Falconio v. Larsen*, *supra*. The court erred in giving charge 13 for the defendant.—*James v. R. & D. R. R. Co.*, 92 Ala. 237. Charge 39 should have been refused.—*Southern Ry. Co. v. Riddle*, 126 Ala. 244; *Moore v. Heineka*, 119 Ala. 627; *Torrey v. Berney*, 113 Ala. 496. Charge 40 was bad.—*Schloss Co. v. Hutchinson*, 40 South. 115. Charge 48 should not have been given.—16 A. & E. Ency. of Law, pp. 562-3. Counsel discuss other assignments of error but cite no authority.

TILLMAN, GRUBB, BRADLEY & MORROW, for appellee.—The personal representative of a decedent may settle and discharge any cause of action for and on account of the death of the decedent.—*Logan v. Central Iron & Coal Company*, 139 Ala. 548. Pleas of accord and satisfaction are liberally construed and are upheld although informal.—1 Ency. P. & P. 79. The money having been paid to personal representatives it is wholly immaterial whether or not the estate ever realized or enjoyed the sum and whether or not the present plaintiff could recover it by reason of the insolvency of the principal or her sureties.—*Harrison v. Alabama Midland R. R. Co.*, 40 South. 294. To disaffirm the contract the amount paid thereunder must be refunded.—*Harrison v. Ala. Mid. R. R. Co.* *supra*. The witness was not qualified to speak as to the mental condition of Mrs. Griffin and the court properly disallowed it.—*Dominick v. Randolph*, 124 Ala. 557. It is the policy of the law to favor an amicable adjustment of differences and it encourages such adjustment by excluding offers to that end when the negotiations failed.—*Gibbs v. Wright*, 14 Ala. 467; *Alexander v. Wheeler*, 69 Ala. 341; *Feibleman v. Insurance Company*, 108 Ala. 198; *Matthews v.*

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*Farrel*, 140 Ala. 308; 16 Cyc. p. 946; 2 Wigmore on Evidence, § 1061. Applying the principles settled in the following cases it will be seen that the court will not be put in error for the giving of the charges asked by defendant.—*McCutcheon v. Loggins*, 109 Ala. 457; *Schaungut v. Udell*, 93 Ala. 302; *Steed v. Knowles*, 97 Ala. 573; *A. G. S. R. R. Co. v. Hill*, 93 Ala. 514; *E. T. V. & G. R. R. Co. v. Beaver*, 79 Ala. 216; *Wadsworth v. Williams*, 101 Ala. 264; *Payne v. Crawford*, 97 Ala. 604. Contractual capacity and testamentary capacity are determined by the same rules and tests.—*Coleman v. Robinson*, 17 Ala. 85; 4 Mayf. p. 1140. A preponderance of evidence is required to reasonably satisfy the jury.—*Battles v. Tallmon*, 96 Ala. 403; *Thompson v. Railroad Co.*, 91 Ala. 496; *Bir. U. Ry. Co. v. Hale*, 90 Ala. 8; *Wilkinson v. Searcy*, 76 Ala. 186; *Bir. Fire Brick Works v. Allen*, 86 Ala. 185; *Railroad Co. v. Jones*, 83 Ala. 376.

HARALSON, J.—We notice only the assignments of error insisted on, the first of which is, that the court erred in overruling the plaintiff's demurrer to the fifth plea. That demurrer proceeds upon the objection, that the plea does not aver or show, that the \$500.00, alleged therein to have been paid by defendant in satisfaction and discharge of the cause of action in this case, was a fair and reasonable amount to be paid and received in satisfaction of said claim, and fails to aver and show that said settlement was authorized or ratified by a court of competent jurisdiction. The demurrer cannot be sustained. Section 138 of the Code of 1896 authorizes an executor or administrator, by the authority of the probate court to compromise or settle a doubtful or bad claim due the estate, but does not prohibit the executor or administrator from settling such a claim, without the authority of the court. That section and the authority of the court to authorize such settlement, is for the greater security of the executor or administrator.—*Logan v. C. I. & C. Co.*, 139 Ala. 549, 556, 36 South. 729.

The plea alleges in the most explicit terms that \$500.00 was paid by defendant to the administrator, the original plaintiff, and that she accepted the same, while

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she was administratrix of the estate of her intestate, "in full settlement, satisfaction and discharge of the cause of action alleged." If the facts there alleged, without more, are sustained, the present plaintiff would be without a cause of action.

What has been said as to the demurrer to this plea, applies with equal force to the demurrer to the sixth plea.

Waiving consideration as to whether the name, Laudine Schuler is idem sonans with Laurine Schuler, it may be said that the real question involved is not one of idem sonans but of identity of person, of whose estate Izora Griffin was the administratrix in chief. The plea leaves no doubt in the mind, that it was the estate of Laurine Schuler, deceased, that is referred to. The estate of no other person is referred to in the pleadings; Izora Griffin was the administratrix of no other estate, and the instrument set out in plea 6 fully identifies the cause of action, the court in which it is pending, the death of the intestate, the injuries complained of, and the character in which the administratrix acted in executing the release. The error assigned is, that the court erred in admitting the release in evidence, and all the evidence affirmatively shows the identity of the personal representatives and of the intestate and the cause of action.

The question propounded to the witness calling for his opinion, as to the mental condition of Mrs. Griffin, went beyond the fact testified to by the witness, and predicated the opinion of the witness upon other matters not testified to by him, and, therefore, the objection was properly sustained.

The testimony as offered by the witness, Bowman, was competent under the issue presented by replication 3 to pleas 5 and 6, as tending to prove the averments of the replication. When thus admitted, it should not be considered by the jury on the issue presented by the general issue to the complaint, as admitting a liability on the part of the defendant, for the injury sought to be recovered for.

It may be that the thirteenth charge for the defendant was bad in employing the words "grossly at fault."

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Negligence short of being gross under section 26 or 27 of the Code of 1896 would justify the imposition of damages such as the jury might deem just in their discretion to assess. If the charge is misleading, in placing one dollar as the measurement of punishment for the killing of the plaintiff's intestate, when the fault is not gross, that was error without injury since the jury found in favor of the defendant.

Charges 1, 3 and 20, given for defendant, assert no proposition of law and might have been refused on this account, but the giving of such charges will not constitute reversible error.

Charges 9 and 14, given for defendant, are argumentative and for this reason should have been refused, although for giving them we do not reverse the judgment. Charge 17 is confusing and misleading and should have been refused.

Charges 18 and 35, given for defendant, are misleading, but this does not constitute reversible error.

Charge 23 invades the province of the jury and ignores other evidence in the case, and should have been refused.

Charge 26 invades the province of the jury and should have been refused.

Charges 30 and 45, given for defendant, are argumentative, and while we do not reverse the trial court for giving argumentative charges, the charges should not have been given.

Charge 36, given for defendant, is invasive of the province of the jury and equivalent to the affirmative charge for defendant on pleas 5 and 6, and the court committed reversible error in giving it.

Charge 37, given for the defendant, in view of the fact that there is evidence tending to show mental incapacity on the part of Mrs. Griffin at the time the release was signed, is bad and should have been refused.

Of charge 39, given for defendant, suffice it to say, it exacts a too high degree of proof and is otherwise vicious.—*Carter v. Fulgham*, 134 Ala. 238, 32 South. 684; *So. Ry. Co. v. Riddle*, 126 Ala. 244, 28 South. 422, and cases there cited.

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Charge 40 should have been refused.—*Sloss-Sheffield Steel & Iron Co. v. Hutchinson*, 144 Ala. 221, 40 So. Rep. 115.

Charges 46, 47, 49 and 50, assume as a fact that Mrs. Griffin talked with her husband about the settlement, without referring the credibility of the evidence to the jury, and the charges are also argumentative; the court erred in giving them.

For the errors indicated the judgment of the circuit court is reversed and the cause remanded.

Reversed and remanded.

TYSON, C. J., and SIMPSON and DENSON, JJ., concur.

## **Johnson v. Birmingham Railway L. & P. Co.**

*Action for Damages for Death of Person on Track.*

(Decided Feb. 5th, 1907. 43 So. Rep. 33.)

1. *Negligence; Pleading; Complaint.*—A complaint which avers negligence in general terms, and then attempts to set out the particular acts constituting the negligence, without more, is demurrable, unless the acts so specified, in themselves, constitute negligence as a matter of law.
2. *Railroads; Persons on Track; Death; Complaint.*—A complaint which avers that the cars were negligently operated, in that, though the night was dark, they did not have a sufficient headlight and were run rapidly, which negligence proximately caused the intestate's injuries and death, does not contain allegations constituting negligence as a matter of law, and is demurrable.
3. *Pleading; Pleas; Objections; Waiver.*—Where an objection is not raised by demurrer that the pleaded acts of contributory negligence were alleged in the alternative, objection thereto is waived.
4. *Negligence; Discovered Peril; Contributory Negligence.*—Counts which allege negligence of defendant's servants after the dis-

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covery of the peril of the intestate, are counts in simple negligence, and subject to pleas of contributory negligence.

5. *Same; Contributory Negligence; Knowledge of Peril.*—Contributory negligence when pleaded as a defense to a complaint which counts on defendant's negligence after discovery of the peril, must show that the negligent act of the person injured, was committed by him with knowledge of his peril.
6. *Railroads; Persons on Track; Trespassers; Discovery of Peril; Evidence.*—The evidence in this case examined and held insufficient to justify a finding that decedent was crossing or walking down the track or laying thereon at the time of the accident, or that the motorman had actual knowledge of intestate's peril in time to have avoided the injury by the exercise of preventive effort.
7. *Same.*—A railroad company is not liable for the death of a person killed by a car while trespassing on the right of way at night, unless it is shown that the motorman had actual knowledge of his peril and could have avoided the same.
8. *Same; Pleading; Burden of Proof.*—The plea of the general issue or not guilty, as an answer to a complaint for killing intestate, a trespasser on the track, puts in issue all the material allegations of the complaint, including the allegation of the discovery of intestate's peril by defendant's motorman in time to have avoided the accident, by the employment of preventive effort and the failure to employ the same, and cast the burden on the plaintiff of proving such allegations.
9. *Appeal; Exclusion of Evidence; Prejudice.*—Where witnesses had testified to the locality and its surroundings, and as to the houses etc., there about the plaintiff was not prejudiced by being prevented from proving that there was a village there.

APPEAL from Jefferson Circuit Court.

Heard before Hon. A. A. COLEMAN.

Action by J. H. Johnson, as administrator of Charles F. Bridgeman, deceased, against the Birmingham Railway, Light & Power Company, to recover damages for defendant's alleged negligence in causing the death of plaintiff's intestate. From a judgment for defendant, plaintiff appeals. Affirmed.

The first count was for willful, wanton, or intentional negligence. The second and third counts were in simple negligence. The fourth count sufficiently appears from the opinion. It is deemed unnecessary to set out any of the counts of the complaint, as they are suffi-



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ciently discussed in the opinion. After defendant's demurrers were overruled to these counts, defendant pleaded: (1) The general issue. (2) "For further plea and answer to the second and third counts of the complaint, severally and separately says that plaintiff's intestate was himself guilty of negligence which proximately contributed to his injuries and death, in this: Plaintiff's intestate negligently remained on said track, in dangerous proximity to the car or train then and there approaching, after the discovery by defendant's servants or agents in charge of the said car or train of the peril of plaintiff's intestate. (3) To the second and third counts of the complaint, separately and severally, defendant says that plaintiff's intestate was himself guilty of negligence which proximately contributed to his injuries and death, in this: plaintiff's intestate negligently went or negligently remained on said track without looking or listening for the train then and there approaching; or in this: plaintiff's intestate negligently went or negligently remained on said track when the said train which collided with him was in dangerous proximity to him, after having discovered that such train was in dangerous proximity; or in this: plaintiff's intestate negligently went or negligently remained on said track after having negligently failed to ascertain the approach of said train." Demurrers were interposed as follows: To the second plea: "Because one of the counts which said plea purports to answer charges defendant with wantonness or intentional wrong. (2) Contributory negligence is no answer to wanton or intentional wrong. (3) Said plea is confused as to what part of the complaint it purports to answer." And to the third plea: "Because the plea is uncertain and indefinite. It does not appear with sufficient certainty whether intestate negligently remained on said track." And to the second plea in so far as it purports to answer the second and third counts all the above grounds, and in addition thereto: "Because it appears from the second count that the negligence counted on was subsequent to the discovery of intestate's peril, and that same was the proximate cause of his injuries. Because said plea is no more than a denial of a material

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part of said count. Because it does not appear that intestate had reasonable opportunity to extricate himself from said peril after same was discovered as aforesaid." All the above grounds of demurrer were separately filed to the third plea as an answer to the second and third counts of the complaint. The evidence is set out in the opinion of the court, as are the questions reserved on objection to evidence.

PINKNEY SCOTT, and BOWMAN, HARSH & BEDDOW, for appellant.—The 4th count of the complaint is not subject to demurrer.—*Glass v. M. C. R. R. Co.*, 94 Ala. 587; *H. A. & B. R. R. Co. v. Robbins*, 124 Ala. 117; *Birmingham Ry. & Elec. Co. v. City Stables*, 119 Ala. 621. The facts are stated from which defendant's duty to act sprang and it was only necessary to aver generally the negligent failure.—*Ensley Ry. Co. v. Cheeming*, 93 Ala. 26; *M. & M. Ry. Co. v. Crenshaw*, 65 Ala. 567; *L. & N. R. R. Co. v. Marbury*, 125 Ala. 637; *Armstrong v. Montgomery St. Ry.*, 123 Ala. 224. The demurrer to the 2nd plea should have been sustained.—*L. & N. R. R. Co. v. Brown*, 121 Ala. 227. Plea 3 was bad and the demurrer should have been sustained.—*H. A. & B. R. R. Co. v. Dusenberry*, 94 Ala. 418; *Andrews v. Black*, 88 Ala. 294; *Hunter v. Rogers*, 50 Ala. 283; *C. of G. Ry. Co. v. Foshee*, 125 Ala. 218; *M. & C. R. R. Co. v. Martin*, 30 South. 830; *C. of G. Ry. Co. v. Lamb*, 124 Ala. 172. The court should have allowed proof as to whether the scene of the accident was a village.—§ 3443, Code 1896, and authorities there cited. This difference applies to cars operated by electricity.—*L. & N. R. R. Co. v. Anchors*, 114 Ala. 492. The jury is entitled to infer that the person charged with negligence or wrong was aware of the danger upon the various facts stated in this case.—*Southern Ry. Co. v. Bush*, 122 Ala. 486; *B. R. & E. Co. v. Smith*, 121 Ala. 355; *Robinson Mining Co. v. Tolliver*, 31 South. 519; *Southern Ry. Co. v. Shelton*, 136 Ala. 191; *C. of G. Ry. Co. v. Partridge*, 136 Ala. 587. Under the facts in this case the question of negligence was for the jury.—*Holmes v. B. S. R. R. Co.*, 140 Ala. 215; *Mouton v. L. & N. R. R. Co.*, 128 Ala. 539.

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TILLMAN, GRUBB, BRADLEY & MORROW, for appellee.—The court properly sustained the demurrers to the 4th count. It cannot be contended that the allegations therein constituted negligence as a matter of law.—*Sweet v. Bir. Ry., L. & P. Co.*, 39 South. 67. Failing to state a cause of action the sustaining of the demurrer to the count was error without injury.—*Bullock v. Coleman*, 136 Ala. 610. Counts 2 and 3 showed that plaintiff's intestate was a trespasser on plaintiff's track.—*Ensley v. Cheving*, 93 Ala. 26. Pleas 2 and 3 filed thereafter are sufficient.—*C. of G. Ry. Co. v. Foshee*, 125 Ala. 199. The court properly gave the affirmative charge.—*C. of G. Ry. Co. v. Foshee, supra*; *Southern Ry. Co. v. Shelton*, 136 Ala. 191; *Glass v. M. & C. R. R. Co.*, 94 Ala. 588; *Nave v. A. G. S. R. R. Co.*, 96 Ala. 267; *G. P. R. R. Co. v. Ross*, 100 Ala. 492; *Tenney v. C. of G. Ry. Co.*, 129 Ala. 523.

DOWDELL, J.—The fourth count of the complaint, to which a demurrer was sustained, after averring in general terms the negligent operation of the car or cars by defendant's servant, contained the following averment: "And plaintiff avers that said car or cars were negligently operated in this: that it was a dark night, said car or cars did not have a sufficient headlight, and were being run rapidly, and said negligence proximately caused said intestate's said injuries and death, to the damage of plaintiff as foresaid." Where a complaint in general terms avers negligence, and then avers the particular act or acts constituting the alleged negligence without more, unless such act or acts in themselves amount to negligence, the complaint is demurrable. Neither of the acts averred in the fourth count, whether taken separately or together, can be said, as a matter of law, to constitute negligence, and there is no averment that they are done or performed in a negligent manner.

The second and third assignments of error relate to the action of the court in overruling plaintiff's demurrers to defendant's pleas numbered 2 and 3. In both and each of said pleas the defense of contributory negligence is attempted to be set up, and it sufficiently ap-

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pears that each was addressed as an answer to the second and third counts of the complaint separately and severally. It is insisted in argument that the third plea is bad, in that the alleged acts of contributory negligence are averred in the alternative. If it should be conceded that the plea is in this respect faulty, the answer is that no such objection was raised by the demurrer.

While the second and third counts of the complaint count on negligence of the defendant's servant after discovery by him of the peril of plaintiff's intestate, they are none the less counts in simple negligence. One of the grounds of the demurrer to the second and third pleas, which set up contributory negligence, is to the effect that the negligence counted on in the second and third counts of the complaint was subsequent to the discovery of intestate's peril, and that same was the proximate cause of his injury. We do not understand the rule to be that an averment in a complaint that the negligence counted on arose after discovery by the defendant of the peril of the person injured will preclude the defendant from setting up the subsequent negligence of the party injured, which proximately contributed to the injury. The rule is otherwise. See *L. & N. R. R. Co. v. Brown*, 121 Ala. 221, 25 South. 609; *C. of Ga. Ry. Co. v. Foshee*, 125 Ala. 199, 27 South. 1006. It may be said to be a universal rule that, to a complaint in simple negligence, contributory negligence may be pleaded as a defense. When, however, contributory negligence is pleaded as a defense to a complaint, which counts primarily for the cause of action on subsequent negligence of the defendant—that is to say, on negligence occurring after discovery of peril—the plea, in order to be good, should show that the negligent act of the party injured, relied on as a defense, was done or committed by him with a knowledge of his peril. In this respect both of the defendant's pleas may be said to be faulty; but the plaintiff's demurrer failed to reach this objection, though possibly it was intended by the ninth ground of the demurrer to do so. The pleas of the defendant, when construed most strongly against the

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pleader, did no more than set up a condition which caused the injury counted on in the complaint.

Upon the conclusion of the evidence in the case, the court, at the request of the defendant in writing, gave the general affirmative charge to find for the defendant. This action of the court is assigned as error, and we think it is the principal question in the case. It is to be borne in mind that the negligence counted on for a right of recovery was negligence of defendant's servant after discovery by him of the intestate's peril. The only evidence offered on the trial was that introduced by the plaintiff, and this evidence without dispute shows that at the time and the place of the alleged injury the defendant was under no duty to keep a lookout for the deceased. The injury occurred at a place where the tracks of the defendant were fenced in on both sides, and not at or near any public crossing, or within any city, town, or village, but in the open country. We think the evidence further clearly shows that the deceased was a trespasser upon the defendant's track; and this, without affording any fair or reasonable inference to the contrary to be drawn by the jury. There is no fact or circumstance in the evidence tending in the slightest degree to show that the deceased, at the time of the injury, was merely in the act of crossing defendant's tracks and for that reason not a trespasser. On the contrary, the undisputed evidence tends to show that the deceased was not in the act of crossing the defendant's tracks, which, of course, he would have the right to do without becoming a trespasser. The only evidence bearing upon this question was that of plaintiff's witness Tom Stone, which was as follows: "On the 10th day of April, 1904, I lived at Wilkes Station on the North Bessemer car line. I came home on the Bessemer car on that car line that night. Several were on the car. I do not know Charles F. Bridgman, but saw him there that night. He got off at Wilkes, the same station I did, about half past 12 o'clock at night. He had ridden from Bessemer, and his destination was Brighton, which is Woodward Crossing. I considered him drunk. He passed his destination and rode on to Wilkes Station. The conductor put his hand on his arm, shook

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him, I think, and he was asleep just before he got there, and asked him where he wanted to get off. That was just before we got to Wilkes Station. After he was put off there at Wilkes Station, he stood around there a little bit, talking and jowring until the next car came, and still did not get on it. That car was going towards Bessemer. He stayed around a few minutes, and went on back down the car line towards Brighton, down that way. The next station he would come to first would be McDonald Station, and the next station Madison. I do not know how far he went down; only where they say he was killed at. I never saw him. I saw where they said he was killed, which was just before you got to the trestle down below the switch between McDonald and Madison, which is between Wilkes and Madison; that is, it was south of Wilkes Station. The next car coming up from Bessemer at 1 o'clock, that was the car that killed him, I suppose. The car went down while we were at Wilkes Station. There was no other car to come by, except that car that went down. That was the last car that night." On cross-examination this witness testified: "The car on which I came up with this man came from Bessemer. I got off at the same station he did, Wilkes Station. There was nobody but me and him, until the other came, and he was drunk. Another car came and went by Wilkes Station. It stopped, and two men got off. He did not get on, and that train went on to Bessemer. The train he got off came on to Birmingham. That was the last trip. It did not go out any more that night. The train that went to Bessemer made one more trip that night, coming back to Birmingham. I saw him starting on down the track. That was the last I saw of him. He was staggering. This was after midnight; after 12:30 o'clock. Where they say his body was found was between a quarter and a half a mile; somewhere near a half mile, I guess. I do not know how far Wilkes is from Bessemer; but I think they call it four miles." This evidence does not afford any fair or reasonable inference that the deceased, at the time of the injury, was merely in the act of crossing the defendant's track. The only testimony bearing on the question of the discovery of the deceased's peril by the

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defendant's servant was that of plaintiff's witness W. M. Zinn, which was substantially as follows: That he was the only passenger on the car that ran over and killed plaintiff's intestate; that at a point between Bessemer and Birmingham witness was suddenly pitched forward in his seat by the sudden stopping of the car, and immediately thereafter felt the force of the collision of the car with some object on the track. He testified that the car was going at about the usual rate of speed, from 10 to 15 miles an hour, and immediately after the car stopped he alighted, and found the intestate near the rear end of the second car of the train, dead. This witness further testified that "he couldn't say that he had seen the motorman at any particular time prior to the accident; that he had no recollection of looking at him just before the accident happened; that he could not say that the motorman was looking forward down the track or to the side, just prior to and at the time of the accident; that he had no distinct recollection on the subject, and that all that he could say was that, whenever he did see the motorman, he was at his post on the front of the car and with his back towards the witness; and that he did look to see what was the matter when the accident happened, and at the time the motorman was at his post." There was evidence that the track at the place of the accident was straight, and that the car was provided with an arc light, which the evidence tended to show would enable one to see or discover a man standing or walking upon the track at a distance of more than 100 yards. The evidence tended further to show that a train like the one in question at the place of the accident, moving at the rate of speed at which it was going, might be stopped within a distance of 120 to 160 feet. The evidence of the plaintiff's witness, Clotfelter, who was examined as an expert, was to the effect that a man lying down on the track would not be discovered under the conditions that existed at a greater distance than 20 or 30 feet in front of the car; that such an object would not be distinguishable from ballast on the track.

On this evidence, we think it would be the merest guesswork or conjecture to say that the deceased was,

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at the time of the accident, crossing the track, or walking down the track, or lying upon the track, or that the motorman had actual knowledge of the peril of the deceased in time to have avoided the injury by the exercise of preventive effort. There must be actual knowledge of the peril; otherwise, there can be nothing upon which to predicate subsequent negligence. The principle is the same in cases where simple negligence after discovery of peril is relied on, as in cases of wantonness or intentional wrong.—*Glass v. M. & C. R. R. Co.*, 94 Ala. 588, 10 South. 215; *Nave v. A. G. S. R. R. Co.*, 96 Ala. 267, 11 South. 391. Of course, this actual knowledge may be inferred from the existence of other facts, shown in the evidence; but the existence of such facts should not rest purely in conjecture or speculation. The evidence in this case, we think, differentiates it from those cases relied on by the appellant, viz.: *Sou. Ry. Co. v. Bush*, 122 Ala. 486, 26 South. 168; *B. R. & E. Co. v. Smith*, 121 Ala. 355, 25 South. 768; *Robinson Mining Co. v. Tolbert*, (Ala.) 31 South. 519; *Sou. Ry. Co. v. Shelton*, 136 Ala. 191, 34 South. 194; *Central of Ga. Ry. Co. v. Partridge*, 136 Ala. 587, 34 South. 927—and brings the case more nearly within the influence of the cases of *Nave v. A. G. S. R. R. Co.*, 96 Ala. 267, 11 South. 391, and *Ga. Pac. Ry. Co. v. Ross*, 100 Ala. 492, 14 South. 282, which cases are more analogous in point of fact than the case at bar. The plea of “not guilty” put in issue all the material allegations of the complaint, and hence the allegation of the discovery of the intestate’s peril by the defendant’s motorman within time to have avoided the accident by the employment of preventive means, and the failure to employ such means, all of which was necessary to be shown to sustain the charge of subsequent negligence, and the burden of showing this was on the plaintiff. Apart from any consideration of the pleas of contributory negligence, we are clearly of the opinion that on the whole evidence, under the plea of “not guilty,” the court was justified in giving the general affirmative charge requested by the defendant.

No reversible error was committed in sustaining the defendant’s objection to the question asked the witness Ansley: “Was that a village along there, Mr. Ansley?”



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It appears from the record that this witness testified to the locality, the surrounding condition as to the houses, etc., affording full opportunity to the jury to determine, as well as the witness could, as to whether there was a village along there. Other witnesses also testified to the locality and its surroundings. So, if there was any error in sustaining the objection to the question, it was error without injury.

Finding no error in the ruling of the court, the judgment appealed from will be affirmed.

Affirmed.

TYSON, C. J., and ANDERSON and McCLELLAN, JJ.,  
concur.

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### *Damages for Injury to Person Crossing the Track.*

(Decided March 2, 1907. 43 So. Rep. 355.)

1. *Master and Servant; Negligence of Servant; Responsibility of Master; Wilfulness.*—An allegation of the negligence of the master may be sustained by proof of negligence of the servant, and when the master participated in the negligence of the servant by directing the latter to do or to perform the negligent act this would operate to change the master's act from simple negligence to intention or wilfulness, if the act complained of was intentionally or wilfully done.
2. *Same; Wilful Act of Servant.*—Where the evidence did not disclose that the defendant corporation participated in the wilful act of its employe or thereafter ratified such act, a count charging defendant corporation with wilfulness or wantonness is not sustained by evidence of such acts on the part of its employe.
3. *Evidence; Expert Testimony; Subject.*—Where a witness qualifies as an expert concerning the operation of street cars he may testify as to the distance in which a car could be stopped, running at the rate of speed of the car in question.

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4. *Same; Conclusion.*—One may not testify that the motorman seemed to try to stop the car as quick as he could; he should be required to state what the motorman did in reference to an attempt to stop the car.
5. *Street Railroads; Injuries to Pedestrians; Action; Evidence.*—It having been shown by defendant's motorman that when he first saw deceased he was walking in a path two or three feet from the side of the track, it was proper to permit him to state whether the car would have struck deceased in passing him at that distance from the car.
6. *Evidence; Opinion.*—A motorman is not entitled to testify whether he stopped the car as soon as he could but must state what he did to stop the car and whether that was all that could have been done to stop the car as soon as possible.
7. *Same; Insanity; Non Experts.*—A non expert testifying on an issue of insanity must be required to state the facts on which his opinion is based.

APPEAL from Birmingham City Court.

Heard before Hon. CHARLES A. SENN.

Action by W. J. Randle, as administrator of the estate of John M. Randle, deceased, against the Birmingham Railway, Light & Power Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

This was an action for damages for the negligent killing of John M. Randle by running over him with a car being operated by defendant over its street railway on a populous street in the city of Birmingham. The pleadings in the case sufficiently appear from the opinion. The witness Clayton was shown to have been a conductor on the car for several months. He was not a motorman, but he testified that he had not ascertained any knowledge as motorman, but that he had ascertained some knowledge as a conductor; that at the time of the accident he had been on the car about three days as conductor, and had been conductor since the action; that he had never stopped the car, but had seen the cars stopped; that he had experience in observing and noticing motormen stop cars, the rate of speed they were going, and the distance in which they can be stopped. He was then asked: "Can you tell the jury as to the distance the car would have to go before it could be stopped,

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when it was going at the rate of 15 miles an hour?" Witness answered: "Upgrade as it was at that immediate distance, the motorman could have stopped the car in three lengths of the car, and the cars are from 28 to 30 feet long." There was objection to the question, and a motion to exclude the answer. The following question was propounded to the witness J. M. Loggin: "Now, I will ask you to state this, the question I asked you: From the point where you said you saw the railroad track, where it struck Mr. Randle, how far was it from that point to where you last saw the car before it did strike Mr. Randle, passing by your house?" The witness answered: "I will say that it was from 25 to 30 feet from where the car struck the man to the point where I last saw the car before it did strike him." There was objection to both question and answer. The other facts sufficiently appear in the opinion of the court.

At the request of the plaintiff, the court gave the following written charges: (1) "The court charges the jury, if they believe from the evidence that the killing of Randle was the result of the wanton negligence of the motorman, your verdict must be for the plaintiff in such sum as the jury think proper, not exceeding \$25,000."

(4) "The court charges the jury, if the jury are reasonably satisfied from the evidence that Randle's death was caused by the wanton negligence of the defendant's employe, the jury must find a verdict for the plaintiff."

(7) "The court charges the jury that if the motorman saw Randle ahead of the car on the track in a dangerous position with reference to the car, or if he saw Randle in dangerous proximity to the track, it at once became his duty to use every means at his command to prevent the injuries to Randle, and if he willfully failed to do so your verdict must be for the plaintiff."

(8) "The court charges the jury that, if they are reasonably satisfied from the evidence that the plaintiff has sustained the averments of the third count as applied to the law as given by the court, then the plaintiff is entitled to recover."

The defendant requested a number of charges, which were refused, but which it is unnecessary here to set out. Charge 11, refused to the defendant, was the af-

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firmative charge as to the third count of the complaint.

Motion was made for a new trial, predicated upon the errors and matters discussed in the opinion, but was overruled. There was a verdict for plaintiff, and his damages were assessed in the sum of \$13,000.

TILLMAN, GRUBB, BRADLEY & MORROW, for appellant.—The doctrine that has been applied to a count charging wanton, willful or intentional acts on the part of the defendant should be applied to a count which avers the simple negligence charge to be negligence of the defendant itself.—*City Delivery Co. v. Henry*, 139 Ala. 169; *Bir. S. R. R. Co. v. Gunn*, 37 South. 329; *Southern Ry. Co. v. Yancey*, 37 South. 341; *Central of Ga. Ry. Co. v. Freeman*, 37 South. 387. Under the foregoing authorities, proof of the actual participation on the part of the defendant in the damnifying act was essential to a recovery by plaintiff under the third count. There are some emotions in appearances that cannot be described in any other way than that they seemed to be so and for this reason Ed. Robinson's testimony should have been admitted.—*Thornton v. The State*, 113 Ala. 32. In the light of the averments of the 2nd and 3rd counts, the motorman Duffy should have been allowed to answer the question as to whether or not he stopped the car as soon as he could.—*Choate v. Southern Ry. Co.*, 119 Ala. 611; *A. G. S. Ry. Co. v. Lynn*, 103 Ala. 138. Sanity being the normal condition of the mind, a witness with proper acquaintance may be permitted to state his opinion that a person is of sound mind, but the question asked the witness Loggin did not fall within the rule thus laid down.—*Ragland v. The State*, 125 Ala. 12; *Torrey v. Burney*, 100 Ala. 57; *Parrish v. The State*, 36 South. On the authorities cited to the first proposition in this brief, the charges given to plaintiff should have been refused.—*L. & N. R. R. Co. v. Black*, 89 Ala. 313. On these same authorities charges 2, 10 and 11 should have been given for defendant. Charge 3 should have been given.—*Harris v. The State*, 96 Ala. 24; *Smith v. The State*, 88 Ala. 73. On the same authorities charges 4 and 5 should have been given. Charges 6, 7 and 8 should have been given.—*Hale v. The*

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*State*, 26 South. 236. Counsel discuss other charges but cite no authority.

DENSON & ULLMAN, and W. A. DENSON, for appellee. —Counsel filed an elaborate brief on the question of the signing of the bill of exceptions, but if any brief was filed on the merits it did not come to the reporter.

DOWDELL, J.—The complaint as originally filed contained three counts. The first count was subsequently withdrawn, and the third count amended. The second count counted on simple negligence, and was in case, while the third count, as amended, was in trespass. This count charged that "The defendant wantonly, willfully, or intentionally ran its car or cars against and over the plaintiff's decedent at said time and place killing the decedent," etc. The damnifying act is alleged to have been the act of the defendant corporation, and not of the servant or agent. We are unable to draw any distinction in principle between this case, in so far as the third count of the complaint is concerned, and the case of *City Delivery Co. v. Henry*, 139 Ala. 161, 34 South. 389, which latter case has been followed in *Birmingham Sou. R. R. v. Gunn*, 141 Ala. 372, 37 South. 329; *Sou. Ry Co. v. Yancey*, 141 Ala. 246, 37 South. 341, and *C. of G. R. R. v. Freeman*, 140 Ala. 581, 37 South. 387.

It is insisted by counsel for appellant that the same doctrine should apply to the second count of the complaint, in which the negligence averred is charged to have been the negligence of the defendant, and not of its agent or servant. We cannot assent to this contention. There is that difference between the averments of the second count and third count as amended that there is between an affirmative act and a failure to act. Willfulness or intention can in no sense obtain in an act of negligence. In law, the principal is always responsible for the negligence of his agent, and in a sense the negligence of the agent is the negligence of the principal. The averment of negligence of the principal may therefore be sustained by evidence of the negligence of his agent. To show that the principal participated in the negligent act of its agent, by directing the agent to

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do or perform said act, would be to change it from negligence to intention or willfulness. There was a total absence of evidence showing, or tending to show, that the defendant corporation participated in any manner or form in the damnifying act, or any subsequent ratification thereof, and it therefore follows, from what we have said above, that the written charges given at the instance of the plaintiff, which were predicated upon wantonness, should have been refused.

Charge 11, requested by the defendant, should have been given. We find no error in the refusal of the several other written charges requested by the defendant.

The witness Clayton was shown by the evidence to have possessed that degree of experience and knowledge in the operation and running of cars which would qualify him to testify as an expert to the distance in which a car could be stopped running at the speed of the car in question, and it was not error to allow him, against the objection of the defendant, to give his opinion on the question. There was no error in admitting the evidence of the witness J. N. Loggin, relative to the distance from where witness last saw the deceased on the track to where the car struck him. There was no error in the exclusion of the statement by the witness Ed Robinson that the motorman "seemed to try to stop the car as quick as he could." This was but an opinion or conclusion of the witness, and he should have been required to state the facts as to what the motorman did after witness saw him put his feet on the bell and his hand on the brake in order to stop the car.

It was competent for the witness Duffey, defendant's motorman, after having testified that when he first saw the deceased he was walking in a path by the side of the track about two or three feet from the street car track, to have further testified whether or not the car would have struck him in passing him at that distance from the track. The same may be said as to the statement contained in the showing made for the absent witness James C. Loggin. Motorman Duffey was asked the question: "Tell the jury whether or not you stopped the car as soon as you could?" The court sustained an objection by the plaintiff to this question. The witness

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should have been required to state the facts as to what he did in order to stop the car, and, after having so stated these facts, it would have then been proper to have further inquired of him as to whether what he did was all that could have been done to stop the car as soon as possible

The rule is well established in this court that a non-expert must state the facts upon which he bases his opinion in testifying as to insanity—*Ragland v. State*, 125 Ala. 12, 27 South. 983; *Burnay v. Torrey*, 100 Ala. 157, 14 South. 685, 46 Am. St. Rep. 33; *Parrish v. State*, 139 Ala. 16, 36 South. 1012.

For the error pointed out, the judgment must be reversed, and the cause remanded.

Reversed and remanded.

WEAKLEY, C. J., and TYSON and SIMPSON, JJ., concur.

## Bradley v. Louisville & Nashville R. R. Co.

### *Action for Damages for Personal Injury in Crossing Track.*

(Decided Dec. 20th. 1906. 42 So. Rep. 818.)

1. *Appeal; Harmless Error; Demurrer.*—Where plaintiff had the benefit under two other counts of all the evidence that could have been offered to the counts to which the demurrer was sustained, the sustaining of the demurrer was harmless.
2. *Negligence; Pleading; General Averment of Wantonness.*—A general averment of wantonness or willfulness will authorize any proof on that subject, in an action for negligence.
3. *Railroads; Injuries to Persons on Track; Contributory Negligence.*—Plaintiff was struck by a locomotive running backward, while standing at a point on the right of way about thirty feet from a regular crossing, and not at a place where people frequently cross. Held, she was guilty of contributory negligence to defeat her right of recovery.

[Bradley v. Louisville & Nashville R. R. Co.]

APPEAL from Concessu Circuit Court.

Heard before Hon. J. C. RICHARDSON.

Action by Lizzie Bradley against the Louisville & Nashville Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Action for damages for personal injuries to person crossing track of defendant at a public crossing. The first count charged simple negligence, and counts 2, 3, 4, and 5 charges wanton or willful negligence. It is unnecessary to set out the pleadings. The evidence for the plaintiff showed that she was hit by a locomotive running backward along the tracks of the Louisville & Nashville Railroad Company in the town of Evergreen about 30 feet above a regular crossing, and that she was standing on the right of way near the tracks. It was further shown by plaintiff's witnesses that it was not a place where people frequently crossed the track, but between the regular crossing and the crossing leading to the Baptist Church in said town. The defendant introduced no evidence. Both sides requested the affirmative charge. The court gave the charge for the defendant, and the plaintiff appeals.

JAMES F. JONES, for appellant.—The court erred in sustaining demurrers to counts 2 and 3 of the complaint.—*Central of Ga. Ry. Co. v. Foshee*, 125 Ala. 199; *Armstrong v. Montgomery St. Ry.*, 123 Ala. 233. The court erred in giving the general affirmative charge for the defendant as to counts 4 and 5.—*Huffman v. Pa. R. R. Co.*, 160 Pa. 568; *Stringer v. Ala. Min. R. R. Co.*, 99 Ala. 397.

GEORGE W. JONES, and RAEB & PAIGE, for appellee.—The court properly sustained the demurrers to 2nd and 3rd counts of the complaint.—*R. R. Co. v. Martin*, 117 Ala. 367; *Foshee's Case*, 125 Ala. 199. If any one ground of the demurrers were well taken the court properly sustained them.—*Hatcher v. Branch*, 37 South. 690. The court properly gave the general charge.—*C. of G. Ry. Co. v. Freeman*, 134 Ala. 354; 122 Ala. 470; 94 Ala. 581; 93 Ala. 209; 96 Ala. 264.



[Abraham Bros. v. Southern Ry. Co.]

SIMPSON, J.—This was an action for damages for personal injuries, claimed to have been suffered by the plaintiff (appellant) from being struck by an engine of defendants. Demurrers were sustained to the second and third counts of the complaint, and the trial was on the first count, which charged simple negligence, and the fourth and fifth counts, charging willful and wanton conduct; the pleas being the general issue and contributory negligence in short by consent.

It is not necessary to consider whether there was any error in the sustaining of the demurrers to the second and third counts, as the fourth and fifth charged willful, wanton, and reckless conduct on the part of the defendant, and under these counts the plaintiff had the benefit of all evidence which could have been produced in support of said second and third counts, so that, if there was error, it was error without injury. A general averment of wantonness or willfulness is sufficient to let in any proof on that subject.—*Foshce's Case*, 125 Ala. 226, 27 South. 1006.

The plaintiff's own testimony shows contributory negligence, and there was not any testimony to sustain the count charging willful or wanton and reckless conduct. Consequently there was no error in the giving of the general charge in favor of the defendant, nor in the refusal to give the same for the plaintiff.

The judgment of the court is affirmed.

TYSON, C. J., and HARALSON and DENSON, JJ., concur.

## Abraham Bros., v. Southern Ry. Co.

*Action for Damages for Injury to Stock.*

(Decided Dec. 20th, 1906. 42 So. Rep. 837.)

1. *Pleading; Dilatory Pleas; Time of Filing.*—Rule 12 of practice in circuit and inferior courts of common law jurisdiction, is inapplicable to a plea in abatement which is in substance an

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amendment of former pleas filed in time, to which demurrers had been sustained and leave granted to amend.

2. *Corporation; Process; Service on Foreign Corporation; Constitutional and Statutory Provisions.*—The act of a foreign corporation in constituting agents, and placing them in a county, authorizing them only to solicit traffic, freight and passenger, but without authority to bind the corporation, was not an act of "doing business" in such county, and in the absence of a line of railroad in the county or the operation of trains through the County, or in the County, the courts of such county have no jurisdiction of causes against such corporations, and as to such county, such corporation is not within the purview of Section 4207, Code 1896, or Section 232 of the Constitution of 1901.

APPEAL from Montgomery City Court.

Heard before Hon. A. D. SAYRE.

Action by Abraham Bros. against the Southern Railway Company. From a judgment for defendant, plaintiffs appeal. Affirmed.

This was an action begun by appellants against the appellee in the city court of Montgomery to recover damages for a failure to deliver live stock. The complaint was filed and summons issued thereon on December 15, 1904, and service was made upon an agent of the defendant in Birmingham on December 16, 1904. On January 20, 1905, the defendant appeared specially and filed a verified plea in abatement, to which a demurrer was sustained. On February 17, 1905, the cause was continued by agreement, and on April 12, 1905, defendant filed an amended plea in abatement, to which demurrers were filed and sustained, with leave to amend the plea.

On December 19, 1905, an amended plea in abatement was filed as follows: "The defendant appearing specially for the purpose of this plea, and for no other purpose, says that this court ought not to have or take cognizance of this suit, because at the time of the commencement of this suit, and at the time the summons issued therein was attempted or pretended to be made upon it, this defendant, a corporation organized under the laws of the state of Virginia, had filed in the office of the Secretary of State of the state of Alabama an in-

[Abraham Bros. v. Southern Ry. Co.]

strument in writing in accordance with the provisions of the laws and Constitution of the state of Alabama, designating Marion F. Richey its agent, and the city of Birmingham as its principal place of business, in the state of Alabama; that defendant was at the time aforesaid, and now is, a common carrier and operates a line of railroad within and without the state of Alabama, but no part of defendant's line of railway runs through or within the county of Montgomery, Ala., and defendant does no business by agent in said county, except that it has a freight soliciting agent in the city of Montgomery, in said county, employed by defendant to solicit shipments of freight to and from the territory in and around Montgomery, Ala., to be routed by the shippers so that the same will pass over defendant's line beyond said county, and said soliciting freight agent has no authority to make contracts for the defendant, and does not collect any payment for transportation of freight by defendant, and does not receive or deliver such shipments, but his sole duties are to solicit business as above set out and other duties of a similar character. And defendant has also a traveling passenger agent, with an office in the city of Montgomery, whose sole duties are to solicit passenger traffic from the territory around Montgomery, Ala., so that the same will pass over defendant's lines beyond Montgomery county, Ala.; but said agent has no authority to sell tickets for such transportation over defendant's lines, and his sole duties are to solicit traffic as above set forth, and to furnish information about defendant's lines and its connections, and to advertise said road, and duties of a similar character. Wherefore defendant prays judgment whether it ought to be required to appear and answer further in said suit." Plaintiff moved to strike this plea, because not filed within the time allowed for pleading, and this motion was overruled.

The plaintiff then demurred to the plea: "(1) Said plea does not deny that the defendant, at the time this suit was brought, was doing business in the city of Montgomery, and in Montgomery county, Ala. (2) Said plea shows that the defendant is properly sued in this county. (3) Said plea shows that the defendant is

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liable to suit in Montgomery county, upon the cause of action stated in the complaint. (4) Said plea shows that this court has jurisdiction of the defendant in this action upon the cause of action sued on." These demurrers were overruled, and the defendant was put to its trial upon its plea of abatement.

MARTIN & MARTIN, for appellant.—Plea 4 came too late and ought to have been stricken.—Rule 12 of Circuit Court Practice. The action of the trial court in refusing to give effect to this rule is reviewable and reversible.—*Beck v. Glenn*, 69 Ala. 121; *Hawkins v. Armour Packing Co.*, 105 Ala. 543. The demurrer should have been sustained to plea 4. It affirmatively appeared therefrom that the city court of Montgomery had jurisdiction.—§§ 232 and 240, Constitution 1901; § 4206, Code 1896; *Farrior v. N. E. Mort. Sec. Co.*, 88 Ala. 275; *Int. C. S. O. Co. v. Wheelock*, 124 Ala. 267; *Sullivan Timber Co. v. Sullivan*, 103 Ala. 471; *Denver & Rio Grande R. R. Co. v. Roller*, 100 Fed. 738; *Christy v. Davis C. & C. Co.*, 92 Fed. 3.

HUGH NELSON, and L. E. JEFFRIES, for appellee.—The action of the court is fully justified by the following authorities: Section 240, Constitution 1901; § 4207, Code 1896; *Home Protection Co. v. Richards*, 74 Ala. 466; *C. & P. R. R. Co. v. Cooper*, 30 Vt. 476; *N. K. Fairbanks Co. v. C. N. O. & T. P. Ry. Co.*, 54 Fed. 420; *Wall v. Chesapeake*, 95 Fed. 398; *Weller v. Pa.*, 113 Fed. 502; *Maxwell v. Ackerson*, 34 Fed. 286; *Beard v. Publishing Co.*, 71 Ala. 60; *Sullivan v. Sullivan Timber Co.*, 103 Ala. 71.

TYSON, C. J.—Rule 12 of practice in the circuit and inferior courts of common-law jurisdiction, prohibiting a plea in abatement to be received, if objected to, unless filed within the time allowed for pleading, has no application to a plea in abatement, which is in substance amendatory of former pleas filed within time, to which demurrers had been sustained, with leave granted to amend. To hold otherwise would deprive a defendant of the right of amendment secured by section 3304 of

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the Code of 1896. Furthermore, if the plea, against which the motion to strike was aimed, the overruling of which is sought to be reviewed, should not be regarded as amendatory of former plea, the court in refusing to strike it, on the state of record as it then was, did not abuse its discretion.—*Hawkins v. Armour Packing Co.*, 105 Ala. 545, 17 South. 16, and cases there cited.

It is shown, both by the averments of the plea and the testimony offered in support of it, that the defendant had no line of railroad in the county of Montgomery, where this action was brought, and did no business therein other than to have in the city of Montgomery, in said county, two soliciting agents—one a freight agent, to solicit shipments of freight to and from that territory, to be routed by the shipper so as to pass over defendant's lines of road outside of and beyond the limits of that county; the other, a traveling passenger agent, whose sole duty was to solicit passenger traffic. Neither of these agents were authorized to enter into any contract or contracts to bind the company, nor to receive and collect money for the transportation of freight or passengers. The question presented is whether this state of facts shows that defendant, a foreign corporation, was "doing business" in the county of Montgomery, within the meaning of section 232, art. 12, of the Constitution, or section 4207 of the Code of 1896; the provision of the former fixing the venue of suits against such corporations "in any county where it does business by service of process upon an agent anywhere in the state," and that of the latter "in any county in which it does business by agent." It is obvious that the words "does business," as used in the constitutional provision and the statute, must have the same meaning.—*Sullivan v. Sullivan Timber Co.*, 103 Ala. 371, 15 South. 941, 25 L. R. A. 543. And upon the principles declared in *Beard v. The Union & American Publishing Co.*, 71 Ala. 60, we feel constrained to hold that the act of the defendant in constituting agents, with no power or authority to bind it, but simply to solicit traffic for it, was not "doing business," within the constitutional or stat-

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utory provisions. See, also, *International Cotton Seed Oil Co. v. Wheelock*, 124 Ala. 367, 27 South. 517.

Affirmed.

DOWDELL, ANDERSON, and McCLELLAN, JJ., concur.

## Louisville & Nashville R. R. Co. v. Britton.

### *Damages for Loss of Goods.*

(Decided Feb. 14th, 1907. 43 So. Rep. 108.)

1. *Evidence; Letters; Admissibility; Proof of Genuineness.*—In the absence of proof of the genuineness of the signature or that they were written in response to a letter from plaintiff, letters received by plaintiff are not admissible against the purported writer or his principal.
2. *Same.*—Where a letter was produced by defendant upon notice to do so, and it was shown to have been written by plaintiff in response to one from defendant's agent and mailed to him, it was admissible, if other wise relevant.
3. *Carriers; Loss or Conversion of Goods; Jury Question.*—Whether or not plaintiff paid the freight upon the goods, held, under the evidence in this case, a question for the jury.
4. *Same; Admissibility of Evidence.*—It was permissible to show by a witness that defendant's claim agent showed him a box of slippers and told them they were plaintiff's and offered to sell them to witness, as tending to show that defendant was in possession of the property and exercising acts of ownership over it; it having been shown that such agent was in charge of the claim department of defendant company.
5. *Trial; Instructions; Statement of Parties Contentions.*—It was not error for the court, in giving its oral charge, to state plaintiff's contentions to the jury.
6. *Carriers; Loss of Goods; Unqualified Refusal to Deliver.*—A carrier may require the production of the bill of lading before consenting to deliver goods. This is a qualified refusal. But a general or unqualified refusal may be shown as evidence of a conversion. But whether qualified or unqualified, held, under the evidence in this case, a question for the jury. }

[Louisville & Nashville R. R. Co. v. Britton.]

APPEAL from Mobile Circuit Court.

Heard before Hon. SAMUEL B. BROWNE.

Action by E. H. Britton against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

See 39 South. 585.

This was an action begun by the appellee against appellant in the justice court to recover for the value of a case of shoes alleged to have been delivered to the defendant for shipment and never delivered to consignee. It was removed on motion of appellant to the circuit court by certiorari, and there tried, resulting in a verdict for the plaintiff. The facts sufficiently appear in the opinion. The court in its oral charge, said: "This is a suit by the plaintiff against the defendant for the conversion of certain goods, which the plaintiff claims were shipped to him from certain parties. Plaintiff claims that these goods were shipped, and that the defendants received them; and after the reception of these goods plaintiff claims that he paid the freight on the goods. Plaintiff further claims that the defendant received the freight payment. He further claims that through one Steve Johnston he demanded possession of these goods, and he further claims that he paid for these goods and thereby became the owner of them. If you are reasonably satisfied from all the evidence that that is true, the plaintiff would be entitled to recover, unless you are reasonably satisfied of the truth of one of the defendant's pleas, which pleads the general issue, not guilty, and, secondly, that the goods were held on account of a nonproduction of the bill of lading. Well, if you are reasonably satisfied from the evidence that the goods were held on account of the nonproduction of the bill of lading, that they were held for that reason, and you are further satisfied that they were honest in that, why, the plaintiff could not recover." The assignment of error as to this charge, and the exception reserved thereto, is that it stated the contention of the plaintiff.

GREGORY L. SMITH and JOEL GOLDSBY, for appellant. The court improperly admitted the letters in evidence.—*O'Connor Mining Co. v. Dickson*, 112 Ala. 304. Under

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the proof in this case the refusal to deliver the goods did not constitute a conversion and the charges requested by defendant on that theory should have been given.—*Alexander v. Southey*, 7 S. & L. 85; *Butler v. Jones*, 80 Ala. 428; 5 A. & E. Ency. of Law, pp. 202-3; *Bank of Rochester v. Jones*, 4 N. Y. 498; *Neal v. Rogers*, 23 S. E. 702. The carrier has the absolute right to have the bill of lading produced before delivering the goods.—*Ratzer v. Burlington*, 66 N. W. 988; *Peoria Nat. Bank v. Northern R. R. Co.*, 58 N. H. 203; *Grayson Co. Nat. Bank v. N. C. & St. L. Ry.*, 79 S. W. 1094.

ERWIN & MCALEER, for appellee.—The court properly admitted in evidence the freight bill.—*Bourdoin v. Alt. C. L. Ry.*, 41 South. 294. Counsel discuss other assignments of error but cite no authority.

HARALSON, J.—1. The plaintiff introduced two letters signed "G. J. Santa Cruz," one dated June 6th, 1902, and the other, October 11th, 1902. The defendant objected to their introduction, on the ground among others, that the signature to the letters was not shown to be the signature of G. J. Sana Cruz. It was not shown that either of the letters was in response to any letter from the plaintiff. The objection should have been sustained. It is settled with us, that "a letter received by another through the mail, at least, one not in response to a letter previously sent to the purported writer, is not admissible against the purported writer, or his principal, without proof of its genuineness."—*O'Connor Min. & Mfg. Co. v. Dickson*, 112 Ala. 308, 20 South. 413.

2. The plaintiff also offered in evidence a letter dated the 13th of October, 1902, written by himself to defendant's said agent, which letter purports to be in reply to one from the agent, and which the witness, Britton, testified he had written and mailed, and it was admitted that this letter was produced by the defendant under notice from the plaintiff. It was objected to, because irrelevant and immaterial, and because it was the mere declaration of the plaintiff as to past transactions, which was not competent evidence against defendant. On the other appeal in this case, it was held, and



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we decline to depart from that holding, that the evidence, for reasons there stated, was competent.—39 South. 585.

3. The plaintiff offered in evidence a freight bill, for "1 c. of shoes" (one case of shoes), marked paid, January 11, 1902, "Geo. J. Santa Cruz." Bufkin, a witness for the plaintiff, who was an employe in the claim department of the defendant company, testified that he knew of a case of felt slippers belonging to Mr. Britton, the plaintiff, that was in the possession of the defendant; that a claim had been presented by Mr. Britton for \$35 for these shoes, and he saw the case after the claim had been presented; that there were two cases of shoes, one arrived at Mobile January 11, and the other February 13, 1902, and that they did not come on the same car. The freight bill, set out in the bill of exceptions, was shown to the witness, and he testified that the waybill had two cases of shoes on it, and read, "1 case of shoes, weight 130 pounds; that the weight and charges included, for two cases, one case to follow this number, but that this was the waybill upon which the first case of slippers came; that that case was delivered; that the second case of slippers, which are in controversy, did not come on that car."

The plaintiff testified that he bought two cases of slippers from Daniel Green Felt Shoe Company, and they sent him a bill therefor, which was afterwards introduced, dated December 24, 1901, and that he paid the bill. He further testified, that the defendant company sent him a freight bill, which the witness produced and identified, and that he paid it. This freight bill was introduced in evidence over the objection of defendant, that it was irrelevant and incompetent. This freight bill purports to be dated January 11, 1902, was for one case of shoes, weighing 100 pounds, freight and charges \$1.93. This evidence tends to show that this freight bill was for the case of shoes, which plaintiff's witness, Bufkin, said arrived, January 11, 1902, and had no reference to the other case, which arrived February 13, 1902. It also tended to show that this was the case, the freight bill for which was sent by defendant's agent to plaintiff on the 11th of January, 1902, and which plain-

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tiff paid on that date. There is no evidence that plaintiff paid a freight bill on but one case. The plaintiff testified further on, that the bill of lading did not come, and he wrote for a duplicate in March following, which was sent to him.

Under the foregoing evidence, it was for the jury to determine whether the defendant presented and plaintiff paid the freight on the case of shoes in question, and was not one for the court to decide as a matter of law.

4. The evidence of the witness, Groom, was, that Bufkin, the claim agent of defendant, showed him some slippers which he said belonged to the plaintiff, and offered to sell them to him. They were in a box marked E. H. Britton, the name of the plaintiff, and were from the Daniel Green Felt Shoe Company. This statement of the witness was not in response to any question propounded to him, on which ground the defendant moved to rule it out, and on the further ground that it was not binding on defendant. The objection was properly overruled. The evidence of the witness tended to show that defendant was in possession of the property sued for, which it was exercising ownership over in proposing to sell it; and it was in evidence that Bufkin was in charge of the claim department of the defendant company. The company had to act through agents.

5. We find no error in that part of the oral charge of the court excepted to by defendant. It correctly stated the plaintiff's contention, whether that contention was right or wrong. The charge was rather favorable to the defendant than otherwise.

The defendant might have properly refused to deliver the goods, without the production of the bill of lading, and if it put its refusal upon that ground, this would be a qualified refusal, and would not make it guilty of a conversion. On the other hand, if the refusal was general, and unqualified, this would be evidence of a conversion. Whether the defendant's refusal was the one or the other, under the testimony, was a question for the jury.

For the errors pointed out the judgment is reversed and the cause is remanded.

[Farley, et al. v. Mobile & Ohio R. R. Co.]

Reversed and remanded.

TYSON, C. J., and SIMPSON, and DENSON, JJ., concur.

## Farley, et al. v. Mobile & Ohio R. R. Co.

*Action for Damages for Loss of Property by Fire.*

(Decided Jan. 16th, 1907. 42 So. Rep. 747.)

1. *Railroads; Setting Fire; Negligence; Evidence.*—The plaintiff made a prima facie case raising the presumption of negligence of the defendant in setting fire among the stubble. The defendant made full proof of the proper equipment and handling of its engine, thus shifting the burden back to the plaintiff. Held, evidence, that a quarter of a mile from the place of the fire, and while going up grade, the locomotive emitted a great deal of sparks, and that several fires during a number of years were occasioned by sparks from defendant's engine, was not sufficient to raise a conflict in the evidence as to the proper equipment and handling of the locomotive.
2. *Appeal; Review; Harmless Error; Instruction.*—Where the general charge is properly given for defendant, the refusal to give charges requested by plaintiff asserting correct legal propositions is harmless error.
3. *Trial; Instructions; Assumption of Fact.*—A charge for plaintiff postulating a finding in his behalf on a disbelief by the jury of defendant's evidence, assuming as a fact that plaintiff has made out his case, is properly refused.

APPEAL from Tuscaloosa County Court.

Heard before Hon. H. B. FOSTER.

Action by Charles F. Farley and others against the Mobile & Ohio Railroad Company. Judgment for defendant, plaintiffs appeal. Affirmed.

This was an action for the recovery of \$180 damages for destruction by fire of 18 tons of hay alleged to have been caused by sparks emitted from one of defendant's engines. The defendant interposed the plea of the general issue. The evidence tended to show that the hay

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was in a field in shocks or ricks near the defendant's right of way, and was burned. The evidence tended to show that the grass was dry in the fields and along the right of way, and that, soon after the local freight train belonging to defendant passed this field going south, the hay ricks were discovered to be on fire. It was further shown that the grass and stubble were burned without a break from near defendant's right of way to the hay rick. The evidence for defendant, and its tendencies, together with the tendencies of the rebuttal evidence introduced by the plaintiff, is sufficiently set out in the opinion of the court. A number of charges were requested by the plaintiff and refused by the court, but it is not necessary to here set them out.

DANIEL COLLIER, and M. T. ORMAND, for appellant.—Proof of the mere fact that the property was damaged or destroyed by fire having escaped from a passing engine is prima facie evidence of negligence in the construction and management of such engine.—*L. & N. R. Co. v. Reese*, 85 Ala. 501. As to the shifting of the burden and the conclusiveness of presumption above stated, see *A. G. Ry. Co. v. Taylor*, 129 Ala. 245; *L. & N. R. Co. v. Marbury Lbr. Co.*, 125 Ala. 237; *Malone's Case*, 109 Ala. 507. The court improperly gave the affirmative charge for defendant.—Authorities supra. Charges asked by plaintiff should have been given. *A. G. S. Ry. Co. v. McAlpine*, 80 Ala. 73; *Geiboldt v. Rogers*, 110 Ala. 445; 115 Ala. 100.

J. M. FOSTER, for appellee.—The uncontradicted evidence for the appellee completely rebutted the prima facie presumption and negligence and the general affirmative charge for defendant was properly given.—*L. & N. R. Co. v. Marbury Lbr. Co.*, 125 Ala. 237; *Reese's Case*, 85 Ala. 502; *Malone's Case*, 109 Ala. 516. The refusal of the three written charges asked by plaintiff was proper.—*Koch v. The State*, 115 Ala. 99.

DOWDELL, J.—The plaintiffs introduced evidence of facts from which it was open to the jury to reasonably infer that the fire which destroyed plaintiff's prop-

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erty originated from sparks emitted from a passing locomotive of the defendant company and falling into the dry grass and stubble near the right of way of the railroad from whence the fire was communicated to the ricks of hay in question. There was no positive or direct proof of any act of negligence on the part of the defendant or its servants; the same being only inferential. The evidence, however, was sufficient under the well-settled rule of law to raise a presumption of negligence in the equipment of the locomotive or its handling, casting upon the defendant the burden of showing proper equipment and handling of the locomotive to overcome the presumption so raised. In order to meet the prima facie case thus made by plaintiff's evidence, the defendant introduced evidence showing that the locomotive was at the time properly equipped with a spark arrester and such other appliances as were in use by well-regulated railroads, that the same were in good repair and proper condition, and that the locomotive was at the time properly and skillfully handled. This evidence was without dispute, and by it the presumption arising from the plaintiff's evidence was met, and the burden shifted back to the plaintiffs. The only evidence offered in rebuttal by the plaintiffs was the testimony of one Montoe Fair, which was as follows: "That he lived in the neighborhood of Duncanville, Ala., which is a station of defendant company in Tuscaloosa county, Ala.; that he saw the train going south on the morning of the 24th day of October, 1904, between 9 and 10 o'clock, and about one-fourth of a mile south of where the hay was burned; that the said train was the south-bound local freight, which passed by that place about that time every day going south; that he was near the track as it passed by him at said place, and that as it passed him a great deal of sparks were being emitted from said engine; that the train was blowing and puffing as it passed him; that it was upgrade for several hundred yards north of the shocks of hay." The bill of exceptions recites: "Witness further stated that he put out fires several times, which caught from sparks emitted by engines of the defendant company, during a period of several years."

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The purpose of this testimony doubtless was, and, indeed, such is the contention of appellants' counsel, to raise a conflict in the evidence as to the proper equipment and handling of the locomotive, such as to require a submission of the determination of that question to the jury. But does it raise such a conflict? It will be observed that the testimony of the witness as to emission of sparks by the engine about a fourth of a mile south of where the fire occurred was that "a great deal of sparks were being emitted from said engine." At this particular place and time the engine with the train was going upgrade, and in the language of the witness was puffing and blowing as it passed him." It is not shown that the sparks which were emitted were in unusual quantities or of unusual size. The facts shown are not at all inconsistent with what may or might be usual and common under like circumstances with all locomotives with proper equipment and appliances and being skillfully handled and operated on other well-regulated railroads. There is a difference between a "great deal" of sparks, and sparks in "unusual quantities" and of "unusual size." The latter would afford reasonable inference of defective equipment or of unskillful handling of an engine, while the former would not. The fact that several fires during a period of several years, had been occasioned by sparks from engines of the defendant company, it not being shown that the locomotive in question was one of such engines, is of no weight or consequence. Under the doctrine laid down in the cases of *L. & N. R. Co. v. Reese*, 85 Ala. 497, 5 South. 283, 7 Am. St. Rep. 66; *L. & N. R. Co. v. Malone*, 109 Ala. 509, 20 South. 33, and *L. & N. R. Co. v. Marbury Lumber Co.*, 125 Ala. 237, 28 South. 438, 50 L. R. A. 620, on the whole evidence, the defendant was entitled to the general affirmative charge as requested.

The court, having given the general charge for the defendant, committed no reversible error in refusing to give the written charges requested by the plaintiffs. See case of *Koch v. State*, 115 Ala. 99, 22 South. 471. Independent of the principle stated in the *Koch Case*, *supra*, the charges were properly refused on other grounds. Each of these charges postulated a finding for the plain-

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tiffs on the disbelief of the jury of the defendant's evidence, and assuming as a fact that the plaintiffs had proven their case.

We find no error in the record, and the judgment will be affirmed.

Affirmed.

TYSON, C. J., and SIMPSON and ANDERSON, JJ., concur.

## Louisville & Nashville R. R. Co., v. Mertz, Ibach & Co.

*Action for Damages for Injury to Property.*

(Decided Jan. 24th, 1907. 43 So. Rep. 7.)

1. *Railroads; Injury to Animals; Negligence; Jury Question.*—Whether defendant was guilty of negligence in failing to stop the train after those in charge of the same discovered that the mules were frightened, and before they backed the wagon against the train and caused the injury, was a question for the jury.
2. *Same; Instructions.*—A charge asserting that if defendant was negligent in failing to stop the train, after its servants discovered the peril, then plaintiff would be entitled to recover unless the jury were reasonably satisfied of the truth of either of defendant's pleas of not guilty by reason of contributory negligence, fails to require that the negligence hypothesized was the proximate cause of the injury and is erroneous.
3. *Trial; Instructions; Burden of Proof.*—A charge asserting that upon the conditions named therein, plaintiff would be entitled to recover unless the jury were reasonably satisfied of the truth of either one of defendant's pleas, in effect, places the burden of proof of the plea of not guilty on the defendant.
4. *Damages; Injury to Property; Repair.*—The measure of damages in this case was not what it would actually cost to repair the wagon, but what it would reasonably cost to put the property in the same condition as it was before the injury, or the difference in value of the property before and after the injury.

[Louisville & Nashville R. R. Co. v. Mertz, Ibach & Co.]

APPEAL from Mobile Circuit Court.

Heard before Hon. SAMUEL B. BROWNE.

Action by Mertz, Ibach & Company against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

This action is for damages done to a wagon and team of mules belonging to the appellees by a train of cars of appellant while being operated along the streets of the city of Mobile. The complaint contained several counts in simple negligence and two in wanton, or intentional, negligence. The evidence for the plaintiff tended to show that the train of cars belonging to appellant were being pushed along the business street on which plaintiff's place of business was located, and in front of which was standing this team of mules and wagon; that the mules became restless at the approach of the train, and backed into the train, damaging the mules and the wagon; that those in charge of the train saw that they were becoming unmanageable, and, without paying them any attention, continued to push the train along the street, making no effort to stop the train after discovering the condition of the mules. The evidence for the defendant tended to show that 16 cars had passed the mules before they showed any signs of restlessness, and that the engine was stopped as soon as the peril was discovered, and that the mules backed into the car next to the tender, or the next to the last part of the moving train. The other facts are set out in the opinion. There was judgment for the plaintiff, and the defendant appeals.

GREGORY L. & H. T. SMITH and JOEL GOLSBY, for appellant.—A railroad company is never liable for an injury that does not result from its negligence, even though it may have been guilty of negligence at the time of the injury.—*A. G. S. R. R. Co. v. McAlpine*, 75 Ala. 119; *S. & N. R. R. Co. v. Williams*, 65 Ala. 75; *A. G. S. R. Co. v. Hark*, 72 Ala. 112; *A. G. S. R. R. Co. v. Carroll*, 97 Ala. 134; *E. T. V. & G. R. R. Co. v. Holmes*, 97 Ala. 334. On these authorities the court erred in assuming that the injury was the proximate cause of the



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alleged negligence. The court further erred in charging as to the measure of damages. The actual cost and not what it ought to have cost to put the wagon in repair was the measure.

FRANCIS J. INGE, for appellant.—Cain was qualified as an expert.—*Southern Ry. Co. v. Crowder*, 135 Ala. 417; *M. & M. R. R. Co. v. Blakely*, 59 Ala. 471; *L. & N. R. R. Co. v. Mothershed*, 97 Ala. 261. The plaintiff was entitled to recover interest from the 21st day of February, 1903.—*A. G. S. R. R. Co. v. McAlpine*, 75 Ala. 113. Counsel discuss other assignments of error but cite no authority.

SIMPSON, J.—This was an action by the appellee (plaintiff) against the appellant (defendant) for damages resulting from a collision by the wagon and mules of the plaintiff with a moving train of the defendant in the city of Mobile; the gravamen of the complaint being that said mules became frightened at the moving train, in plain view of those in charge of the train, and they failed to check or stop the train until the frightened mules backed the wagon against the train and thus caused the injury. The motion by the defendant to exclude the evidence of the plaintiff was properly overruled. As said by this court, when this case was before it at a previous term: "The question, we think, under the evidence, was properly left by the court to the jury."—*L. & N. R. R. Co. v. Mertz, Ibach & Co.*, (Ala.) 40 South. 60, 62.

The court of its own motion charged the jury as follows: "If the jury are reasonably satisfied that the defendant was negligent in the matter of stopping the train after they discovered the peril, then the plaintiff would be entitled to recover"—to which the defendant excepted, and the attorney for the plaintiff, calling the court's attention to the fact that it had overlooked the pleas of the defendant in the case, "the court then said to the jury that it would amend that charge by adding that, of course, if they are reasonably satisfied of the truth of either one of the defendant's pleas, not guilty, contributory negligence, why, of course, they could not

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recover." Without dwelling upon the indefiniteness of the charge and explanation, in that it is difficult to tell to whom the pronoun "they" before "could not recover," in the charge, refers, we think that the explanation did not remedy the principal defect in the charge. In the present case it is claimed by the defendant that there is nothing to show that the motion of the cars had anything to do with the injury, but that in all probability, even if the cars had been stopped still the moment the mules became frightened, still they would have continued to rear and back against the train, with the same result. But, without regard to that contention, it is clearly incumbent on the plaintiff to allege and prove, not only that the agents of the defendant were guilty of negligence, but also that said negligence was the proximate cause of the injury, and a charge which leaves out one of these necessary elements of the plaintiff's case, in order to a recovery, is necessarily defective, and it is error to give such a charge.—*Lafayette Carpet Co. v. Stafford*, (Ind. App.) 57 N. E. 944, 946; *Hall v. Cooperstown, etc.*, (Sup.) 3 N. Y. Supp. 584; *Guinard v. Knapp, Stout & Co.*, (Wis.) 62 N. W. 625, 627, 48 Am. St. Rep. 901, second column; *Boelter v. Ross Lumber Co.*, (Wis.) 79 N. W. 243, 245, second column; *Gulf, C. & S. F. Ry. Co. v. Williams*, (Tex. Civ. App.) 39 S. W. 967, 968, second column; *Hillsboro Oil Co. v. White*; (Tex. Civ. App.) 41 S. W. 874; *A. G. S. R. R. Co. v. Carroll*, 97 Ala. 134, 11 South. 803, 18 L. R. A. 433, 38 Am. St. Rep. 163; *A. G. S. R. R. Co. v. McAlpine & Co.*, 75 Ala. 119. In addition, it may be said that the explanation of the charge placed upon the defendant the burden of proving the plea of not guilty.

The court also charged the jury that, "if the plaintiffs were entitled to recover, then they were entitled to recover the value of whatever it cost to put the wagon in proper repair, to put it in the same condition as before." This was erroneous. The measure of damages would be, not what it actually cost, but what it would reasonably cost to put the property in such condition as it was before, or the difference in the value of the

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property before and after the injury.—13 Cyc. 148; *Armington v. Stelle*, (Mont.) 69 Pac. 115, 94 Am. St. Rep. 812.

The judgment of the court is reversed, and the cause remanded.

TYSON, C. J., and HARALSON and DENSON, JJ., concur.

## Southern Ry. Co. v. Cofer.

### *Damages for Failing to Deliver Goods in Reasonable Time.*

(Decided Feb. 14th, 1907. 43 So. Rep. 102.)

1. *Evidence; Parol; Shipment of Goods; Place of Delivery; Custom.*—It was competent to show by parol evidence the existence of a custom to shed light upon the intention of the parties as to how the bill of lading should be understood with respect to the place of delivery, where the bill of lading for certain cotton shipped over defendant's road read "Name, G. K. Place, West Point, Va. County, care press. State, Selma, Alabama," the same being an ambiguity on the face of the bill.
2. *Carriers; Delay in Delivery; Damages; Instructions.*—It was error to instruct that the damages for delay in delivery of the cotton should be estimated at the price of the cotton at the place of delivery, when the bill of lading provided that the amount of damages for which the carrier should be liable should be computed at the value of the cotton at the time and place of shipment.
3. *Same; Evidence; Competency.*—Where the bill of lading bound the railroad only to transport with as reasonable dispatch as its general business would permit, and one of its pleas was that an unprecedented amount of freight prevented its handling the cotton more expeditiously, it was competent to show that a subsequent shipment reached the same destination prior to the first shipment, as to the delay and in refutation of the plea.
4. *Same; Notice of Arrival.*—In view of the provisions of Section 4224, Code 1896, it was competent to show, in an action for

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damages for delay in delivery of goods, that the railroad failed to give the consignee notice of the arrival of the goods until a certain date, as tending to show that the goods did not arrive until at or about that date.

5. *Appeal; Evidence; Harmless Error.*—When a witness gives in detail evidence fully answering a question it is harmless error to sustain an objection to such question.
6. *Same.*—A witness was allowed to detail the fact concerning the conditions “alongside” the press at the time inquired about, and it was harmless error to exclude a question as to whether it was possible to get alongside the compress with freight at a certain time.
7. *Same; Numbering Charges.*—While it is not fatal, on appeal, to fail to number requested written instructions, it should be avoided where the charges are numerous.

APPEAL from Dallas Circuit Court.

Heard before Hon. B. M. MILLER.

Action by E. G. Cofer against the Southern Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

The appellee, who was a merchant at Randolph, Ala., shipped 23 bales of cotton, as per bill of lading set out in the opinion, from Randolph, Ala., over the lines of the appellant, delivering the cotton to appellee on the 25th and 26th days of November, 1904. The cotton was not delivered at the compress in Selma, so far as the facts in this case disclose, until the 15th day of December following. The facts and the pleadings are sufficiently set out in the opinion. Counts 1, 2, 3, 6, 7 and 8 claim \$115 damages for the failure to deliver within reasonable time 23 bales of cotton, giving weight, etc., date of shipment, and point of shipment. Counts 4 and 5 claim, respectively, the failure to deliver 12 and 11 bales of cotton shipped on, respectively, the 26th and 25th of November, 1904.

CHAMBLISS KEITH, DANIEL PARTRIDGE, JR., and PETTUS, JEFFRIES & PETTUS, for appellant.—The court erred in admitting the testimony of the witnesses Cofer and Hooper as to the receipt of certain other cotton before the arrival of the cotton in suit.—1 Greenleaf's Evidence, (14th Ed.) §§ 51 and 52. The court also

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erred in permitting Hooper to testify as to the usual custom as to bills of lading and the usual manner of shipping cotton through brokers.—*Smith v. Southern Express Co.*, 104 Ala. 387; *L. & N. R. R. Co. v. Fulgham*, 94 Ala. 555; *Tallassee Falls Co. v. Western Ry. of Ala.*, 117 Ala. 520; 6 Cyc. 420. The court erred with reference to the testimony of the witness McPeck, 5 A. & E. Ency. of Law, 256; 6 Cyc. 445. There was a variance between the proof and the pleading fatal to recovery.—*Montgomery R. Co. v. Culver*, 75 Ala. 587; *A. G. S. v. Vernon Co.*, 84 Ala. 173; *Moses v. Beverly*, 137 Ala. 479; *A. G. S. v. Thomas*, 83 Ala. 345; *A. G. S. v. Grabfelder*, 83 Ala. 201; 22 A. & E. Ency. P. & P. 562 (Variance); *A. & W. P. v. Texas State Co.*, 9 E. (Ga.) 600.

The measure of damages was improperly stated by the court.—5 A. & E. Ency. of Law, 274.—*Southern Pac. R. R. Co. v. Arnett*, 111 Fed. 849; *Southern Ry. Co. v. Webb*, 39 South. 262.

PITTS & PITTS, for appellee.—No brief came to the reporter.

DENSON, J.—This is an action by a shipper against a common carrier for damages arising from a failure to deliver cotton at the point of destination within a reasonable time after the cotton was delivered to the carrier and accepted by it for shipment. The cotton was delivered by the plaintiff to the defendant in two lots of 11 and 12 bales, respectively, on the 25th and 26th days of November, 1904, at Randolph, Ala., a station on its line of road.

In some of the counts of the complaint it is alleged that the cotton was shipped to be delivered "to order Gary, Kennedy & Co., at Selma, Alabama," while in other counts the allegation is that the cotton was to be delivered "to Gary, Kennedy & Co., West Point, Virginia, care of the press, Selma, Alabama." In the bills of lading the statement in respect to the consignee and destination is as follows: "Consignee and destination: Name, Gary & Kennedy. Place, West Point, Va. County, care Press. State, Selma, Ala." The proof shows with-

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out conflict that the plaintiff delivered the bills to Gary, Kennedy & Co., at Selma, Ala. It was further shown that Gary, Kennedy & Co. was a firm of wholesale grocers and cotton commission merchants doing business in Selma, Ala., and the plaintiff testified that he shipped the cotton to that firm at Selma, Ala., to sell for him for a consideration. On the face of the bills it appears to us that there is presented an ambiguity with respect to the place of delivery, which renders the contracts susceptible of two reasonable constructions. This being true, it was competent for the plaintiff to prove the existence of a custom to show the sense in which the contracting parties intended the bills of lading should be understood in respect to the place of delivery. In this view we hold that the court committed no error in allowing the witness Hooper to testify as to the custom with respect to the issuance of bills of lading when cotton is shipped to commission merchants or brokers, and the usual manner of shipping cotton through brokers.—*Barlow v. Lambert*, 28 Ala. 704, 65 Am. Dec. 374; *M. & E. Ry. v. Kolb & Hardaway*, 73 Ala. 396, 49 Am. Rep. 54; *East Tenn., Va. & Ga. R. R. Co. v. Johnston*, 75 Ala. 596, 604, 51 Am. Rep. 489; *Buyck & Cain v. Schwing*, 100 Ala. 355, 14 South. 48. The evidence of Hooper tends to show that the custom was observed by the defendant in the issuance of bills of lading at Randolph, and by delivering the cotton finally at Selma, and, as a natural consequence, that defendant was aware of the custom. It further shows without conflict that the cotton was actually delivered to Gary, Kennedy & Co. at Selma on the 15h of December, 1904.

The bills of lading each contain the following stipulation in respect to the rule for the admeasurement of damages in case of loss: "The amount of any loss or damage for which any carrier becomes liable shall be computed at the value of the cotton at the place and time of shipment under this bill of lading, unless a lower value has been agreed on or is determined by the classification upon which the rate is based, in either of which events such lower value shall be the maximum price to govern such computation." It will be observed that no exemption from liability on account of negli-

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gence is involved in this stipulation, but the sole effect of it is to fix the place at which the price of the cotton shall be ascertained in respect to the measurement of damages. It has been held that such stipulations in bills of lading are reasonable and enforceable. This being true, the general rule which fixes the value of the goods at the place of delivery at the time at which they should have been delivered as the one for the admeasurement of damages was varied by the contract of the parties; and the court erred in the oral charge to the jury requiring the damages to be estimated with respect to the price of cotton at Selma, instead of Randolph, and in permitting evidence of the value of cotton at Selma.—*L. & N. R. R. Co. v. Oden*, 80 Ala. 38.

The bills of lading contained this stipulation: "No carrier is bound to carry said cotton by any particular train or in time for any particular market, or otherwise than with as reasonable dispatch as its general business will permit." This stipulation was pleaded in defense by special plea 4, which, in connection with the stipulation, contains the further averments that, "at the time the property described in the plaintiff's complaint was delivered to the defendant, the defendant as a common carrier was burdened with an unprecedented quantity of freight to and from divers points, and especially to the point of Selma, Ala.; that such unusual conditions in the quantity of freight to be hauled at this particular time and to this particular point had never before existed, and the existence of the aforesaid conditions prevented the defendant from hauling the said described property more expeditiously than it hauled it; and that the delay in hauling said freight was brought about by the aforesaid conditions." To this plea the plaintiff replied specially, and substantially, that the defendant failed to notify plaintiff at the time of the shipment of the conditions set out in said plea, and to this replication the defendant rejoined by averring knowledge on the part of the plaintiff of the conditions specified in the plea. If the plaintiff shipped other cotton from Randolph over defendant's line to Selma after shipping the two lots involved in this controversy, and the subsequent shipment arrived in Selma

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prior to the two lots, evidence of these facts would be competent in respect to delay on the part of the defendant and in refutation of the facts set up in plea 4. The court did not err in allowing the plaintiff to give such evidence on his rebuttal examination. We remark, however, that it is not made to affirmatively appear that the subsequent shipment was made over defendant's line of road; but this point was not clearly raised by the objections that were interposed.

Hooper, having testified that he was a member of the firm of Gary, Kennedy & Co. at Selma, and that plaintiff delivered to him the bills of lading for the cotton in question about the 25th or 26th of November, 1904, was asked this question: "What time did you receive notice that the cotton was at the compress?" The objections to the question were that it called for illegal evidence, and the bills of lading are through bills of lading, and there is not any duty on the part of the defendant to give notice of the arrival of the cotton. We think neither of the objections is meritorious. In respect to the second objection, we have already held that it was a question subject to explanation by parol evidence as to whether Selma was the point of delivery. Under section 4224 of the Code of 1896 defendant could not relieve itself of liability as a common carrier, in a place the size of Selma, by reason of a deposit or storage, unless, within 24 hours after the arrival of such freight, notice thereof is given the consignee personally or through the mail. In view of this section, we cannot say that failure to give the notice until December 15, 1904, and the giving of it on that day, is not some evidence of the fact that the cotton was delayed in delivery until at or close to that day; especially so, when the proof is that the cotton was shipped from Randolph in the cars of the defendant about three days after the bills were issued, that Randolph is only 40 miles distant from Selma, half a day is the time required for a freight train to make the trip from Randolph to Selma, and that cotton shipped from Randolph should be delivered at Selma within two days. Moreover, the undisputed fact is that the cotton was delivered at Selma on the 15th day of December, 1904, to Gary, Kennedy & Co.



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The matter embraced in the tenth ground in the assignment of errors has been disposed of by what has been said in respect to the evidence of the plaintiff on his rebuttal examination as to other shipments of cotton.

If it was error in the court to sustain the objection of plaintiff to the question propounded to witness McPeck: "Was there an unusual quantity of freight?" it affirmatively appears that the witness gave evidence in detail that is a full answer to the question, and thereby the error was rendered harmless.

If, in sustaining the objection to this question, propounded to McPeck, namely, "Was it possible to get alongside the compress at that time with freight?" the court committed error, it was error without injury to the defendant, as it affirmatively appears from the bill of exceptions that the witness was allowed to fully detail the facts with respect to the conditions "alongside" the press.

While the court sustained objections to questions propounded to witness McPeck, which rulings are covered by the thirteenth, fourteenth, and fifteenth grounds in the assignment of errors, the record affirmatively shows that the witness finally answered the questions by detailing the facts. Consequently the defendant suffered no injury by the rulings of the court on the objections to the questions.

It may be well to remark, in respect to these questions and some others here passed on, that plea 4, which sets up the condition in the bill of lading with respect to carrying the cotton with reasonable dispatch as "defendant's general business will permit," invokes immunity from liability for delay, not on account of any congested condition of the defendant's business existing at the compress in Selma, nor, indeed, on account of such condition at Selma; but the gravamen of the plea is the superabundance of freight that was to be shipped to Selma from other points on defendant's line of road on which Randolph was located, and including Randolph, and, as is expressly averred in the plea, "the existence of such conditions prevented the defendant from hauling the cotton of plaintiff more expeditiously than

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it hauled it." And the conditions at the compress in Selma in 1904 were not within the defense set up in the plea. Nor was it a dearth of cars that prevented the hauling, because it is shown without conflict in the evidence that within two or three days from the time the cotton was delivered to defendant at Randolph it was loaded into cars and ready for shipment.

Even on defendant's theory of tracing knowledge to plaintiff, it was immaterial whether the conditions were as favorable at Randolph as they were around Selma for harvesting the crop in 1904. The undisputed proof showed that plaintiff lived seven miles from Randolph, and the court properly sustained the objection propounded by defendant to witness Schwarz calling for conditions for harvesting at Randolph. But it seems that the defendant got the evidence called for, notwithstanding the court sustained the objection, as the witness testified that "the conditions in the entire territory tributary to Selma were very fine during the season of 1904, and Randolph is tributary to Selma."

We have disposed of all assignments of error in respect to the court's rulings on the admissibility of evidence that have been insisted on.

Without noticing the charges refused to the defendant in detail, as the cause must be reversed for errors already pointed out, we may say, for the guidance of the parties and the court on another trial, that the proof does not support the fourth and fifth counts of the complaint. The first, second, third, sixth, seventh, and eighth counts allege the shipment under only one contract, whereas the evidence shows two bills of lading issued on separate days. They also allege that the cotton was to be delivered to the order of Gary, Kennedy & Co. for the benefit of plaintiff, whereas the contract states the names of the consignees as Gary & Kennedy. It may be that these discrepancies may be eliminated by amendment.

The charges requested by defendant are not numbered. While it is not a fatal defect that they are not numbered, yet the failure to number when charges are numerous should be avoided.—*Gibson's Case*, 89 Ala. 121, 8 South. 98, 18 Am. St. Rep. 96.

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The oral charge in respect to the measure of damages has been passed on. No other error assigned in respect to the oral charge has been insisted on. It is true appellant in its brief insists on assignment 15 as covering a part of the charge; but an inspection of the record will show that assignment does not relate to the charge of the court.

For the errors pointed out, the judgment is reversed, and the cause remanded.

Reversed and remanded.

TYSON, C. J., and HARALSON and SIMPSON, JJ., concur.

## Central of Ga., Ry., Co., v Sturgis.

### *Damages for Trespass by Animals on Account of Defective Cattle Guards.*

(Decided Feb. 14th, 1907. 43 So. Reporter, 96.)

1. *Railroads; Construction; Cattle Guards.*—Under Section 3480, Code 1896, one not the owner of land cannot sue for damages for failure to place and maintain cattle guards on such land, nor is he entitled to recover damages caused by hogs trespassing thereon that enter his land through a cattle guard not on his land.
2. *Action; Complaint; Demurrers.*—A complaint for damages under Section 3480, Code 1896, which alleged damages by reason of defendants failure to repair the cattle guards on plaintiff's farm, but which fails to allege that plaintiff is the owner of the land, or that defendant ever erected cattle guards thereon, is subject to demurrer.
3. *Same.*—A complaint which averred the construction of cattle guards by defendant, the ownership in the plaintiff of the lands during a given time, when defendant was operating a railroad through such land, failure to keep the gap in repair after demand by plaintiff on defendant's agent and damages resulting therefrom, is not subject to demurrer for failing to allege ownership in the land when the injuries occurred, as a departure from the original cause, or as failure to aver notice to defendant's agent, or as failing to sufficiently describe the land.

[Central of Ga. Ry. Co. v. Sturgis.]

APPEAL from Covington Circuit Court.

Heard before Hon. H. A. PEARCE.

Action by R. M. Sturgis against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

The original complaint is in the following language: "Plaintiff claims of the defendant the sum of \$100 damages, as follows: Plaintiff avers that he operates a farm in Covington county, Alabama; that said farm is inclosed by a fence; that he cultivated during the year 1903 on said farm cotton, corn, potatoes, and ground peas. Plaintiff further avers that defendant is engaged in operating a railroad in Covington county, Alabama, and that the track of defendant's said railroad runs through plaintiff's farm; and plaintiff says that it is defendant's duty to erect suitable stock gaps where defendant's track enters into and passes out of plaintiff's farm, and to keep the same in such repair and condition at all times as will prevent stock from going over defendant's track and into plaintiff's farm. Plaintiff avers that defendant negligently allowed the stock gaps where defendant's railroad track enters plaintiff's farm to remain out of repair, or in such condition that hogs could pass over the said stock gaps and into plaintiff's farm. Plaintiff avers that, in consequence of said stock gaps being allowed to remain in such condition, a great number of hogs went over the same and into plaintiff's farm; and said hogs broke down and destroyed a great deal of plaintiff's corn, and rooted up and destroyed a great many of his potatoes and ground peas then growing thereon, namely, from the 12th day of September, 1903, all of which was caused by the negligence of the defendant in allowing said stock gaps to remain out of repair or in such condition as stock could pass over it to the great damage of the plaintiff," etc.

The following, among other, grounds of demurrer were interposed: "(2) Because the complaint fails to show that the plaintiff was the owner of the land on which the injury complained of is alleged to have been committed or done at the time of the injury. \* \* \* (5) Because the complaint fails to aver that the defendant ever erected any stock gaps or cattle guards upon their

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railroad on any land owned by the plaintiff." The trial court overruled these demurrers.

Afterwards the complaint was amended by adding the following count: "The plaintiff, Sturgis, claims of the defendant the further sum as damages, for that he is the owner of a farm in Covington county, Alabama, and was the owner of the same during the months of September, October, and November, 1903. Defendants were during such time engaged in operating a railroad in and through said county, which railroad passed through the said lands of plaintiff. Where said railroad entered upon or into the cultivated land of plaintiff, the defendant had constructed a cattle guard; but, after demand made by plaintiff upon the defendant's agent, L. B. Vardeman, the defendant negligently failed to keep the said cattle guards in good repair, whereby a great number of hogs were allowed to pass over, around, or through said stock gaps, and into the said cultivated land of plaintiff, during the said time, to-wit, September, October, and November, 1903, and broke down and destroyed a great deal of plaintiff's corn, and rooted up and destroyed a great many of his ground peas and potatoes planted and then growing on said cultivated land, which were of value to plaintiff, to his damage aforesaid."

Demurrers were filed to this complaint: "(a) Said count fails to aver that plaintiff was the owner of the land upon which the injuries complained of were sustained at the time the said injuries were sustained. (b) Said count is a departure from the original complaint, in that the negligence complained of in the original complaint was a failure to keep the stock gap in repair, and the negligence complained of in the amended count is a failure to keep the cattle guards in repair. (c) Said count does not specially aver when demand was made on defendant's agent to repair the cattle guard. (d) It fails to aver that plaintiff ever made known to defendant's agent that it was necessary to repair the cattle guards. (e) It fails to describe the land owned by plaintiff and upon which the cattle guard was erected." These demurrers being overruled, defendant

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filed plea of the general issue and the statute of limitations of one year.

- . The plaintiff, testifying in his own behalf that the railroad ran through lands owned by him on which he had planted 25 acres of corn and several acres of potatoes and ground peas, that the stock gap had been erected by the railroad, that stock had began to get into his field about the 1st of July, when he asked defendant's agent to have the same repaired, and it was repaired, but the stock continued to cross the gap into the field, and after testifying to the value of the property destroyed, further testified that one of the stock gaps through which the hogs had gone was on the land owned by his mother-in-law, but of which witness was in possession, and had been for more than 20 years, and that all the crops growing on the lands belonged to plaintiff. Motion was made to exclude all the testimony as to damages done by hogs which passed through the gap on the lands belonging to plaintiff's mother-in-law. The defendant then asked the witness if he owned all the land upon which the 27 acres of corn were grown, and the question, "Did your mother own any of the land on which the 27 acres of corn were planted?" Objection was sustained to both of these questions. The witness Bozeman testified that he saw hogs go over the west stock gap, and that that gap was on the lands of plaintiff's mother-in-law. Defendant interposed objection to this evidence, and moved to exclude it. This motion was overruled. There was also evidence tending to show that some of the land on which crops were grown belonged to plaintiff's mother. This evidence was excluded on motion of plaintiff.

There was verdict and judgment for plaintiff in the sum of \$114.

CHARLES P. JONES, and W. F. THETFORD, JR., for appellant.—Under the statute a railroad is not required, before demand made by the owner of the land, to put in cattle guards.—*L. & N. R. R. Co. v. Murphree*, 129 Ala. 433. From the above authority the demurrers should have been sustained and the testimony as to the damage done by hogs on land other than that of the plain-

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tiff should have been excluded. There was a fatal variance between the allegations of the complaint and the proof as to the cattle guards and damage done by reason of the absence of proper cattle guards.—*Webb v. Crawford*, 77 Ala. 440; *Lewis v. Harris*, 31 Ala. 689; *Prestwood v. Eldridge*, 119 Ala. 72; *Gilmer v. Wallace*, 75 Ala. 220; *Gamble v. Kellum*, 97 Ala. 677; *Pryor v. L. & N. R. R. Co.*, 90 Ala. 32; *Jackson v. Bush*, 82 Ala. 396; *Freeman v. McCann*, 37 Ala. 714; *Ikelheimer v. Chapman*, 32 Ala. 676.

STALLINGS & REID, for appellee.—The counts were properly drawn and the court committed no error in overruling the demurrers.—Sec. 3480, Code 1896.

DENSON, J.—Section 3480 of the Code of 1896 is in this language: "Every person or corporation operating a railroad must put cattle guards upon such railroad and keep the same in good repair, whenever the owner of the land through which the road passes shall make demand upon them or their agents, and show that such guards are necessary to prevent the depredation of stock upon his land." This section of the Code was construed in the case of *L. & N. R. R. Co. v. Murphree*, 129 Ala. 432, 29 South. 592. That was a suit prosecuted by a tenant of the landowner against the railroad company to recover damages caused by hogs getting into the plaintiff's (tenant's) field and destroying his crop. The cause of action was rested upon the railroad's failure to keep in repair a cattle guard on its road after demand made by the plaintiff. It was held in the case cited that the statute, being in derogation of the common law, should be strictly construed, and, following this rule of construction, it was held that the language of the statute forbids a construction extending its provisions to any other person than the owner of the land. The appellee assails the soundness of that decision, and asks that the court depart from it.

We are satisfied with the interpretation there placed on the statute, and must adhere to it. It follows that the second and fifth grounds of the demurrier to the or-

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iginal complaint should have been sustained. The averments of the original complaint are barely sufficient to show that the railroad had erected any stock gap. Certainly they are insufficient to show the erection of a stock gap on the land owned by the plaintiff. The count added by amendment is not subject to the demurrer made to it.

It is not necessary to pass in detail on exceptions reserved to the rulings of the court on the admissibility of evidence. Suffice it to say the plaintiff could not recover for damages done crops growing on his mother-in-law's land, or lands which he did not own, notwithstanding he may have been cultivating them. Nor could he recover for damages caused by hogs that did not enter his land through the stock gap that was located on his land. Some of the court's rulings on the evidence are out of harmony with what we have here said. For the errors pointed out, the judgment of the circuit court is reversed, and the cause will be remanded.

Reversed and remanded.

TYSON, C. J., and HARALSON, DOWDELL, SIMPSON, ANDERSON, and MCCLELLAN, JJ., concur.

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*Action for Damages for Personal Injury.*

(Decided Jan. 16, 1907. 43 So. Rep. 367.)

1. *Appeal; Assignment of Error; Record; Review.*—Where the appeal is taken from the overruling of a motion for a new trial assignments of error predicated on exceptions reserved on the trial, not made ground of motion for new trial, cannot be considered on appeal.
2. *Same; Instructions; Objections; Exceptions; Necessity for.*—Objection to the oral charge must be made and exceptions reserved thereto at the time of its delivery in order to make such



objections the basis for a new trial and have the same considered on appeal from the overruling of such motion.

3. *Same; Improper Remarks of Court.*—An objection to an improper remark made by the court during the trial must be reserved by an exception thereto at the time of its making and the same made a ground for motion for a new trial, before it can be considered on an appeal from a judgment refusing a motion for a new trial.
4. *New Trial; Grounds; Surprise.*—One cannot claim surprise as a ground for a new trial, based on the testimony of the officer of the corporation that such person made certain admissions, where such person denied making any admission while testifying in his own behalf on redirect examination; the remedy of a party taken by surprise at the testimony of witness of the adverse party, is by motion for a continuance.
5. *Same; Newly Discovered Testimony; Cumulative Testimony.*—A new trial will not be granted on the ground of newly discovered testimony which is merely cumulative.

#### APPEAL from Jefferson Circuit Court.

Heard before Hon. A. A. COLEMAN.

Action by Kitt Geter against the Central Coal Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Many assignments of error are predicated upon the action of the court upon the trial of the cause, but are not considered in the opinion, for the reason clearly stated therein. Plaintiff filed an application for a new trial, assigning the following grounds: "(1) Because the plaintiff was taken by surprise on the trial in this: That the defendant, through one of its officers, claimed that on a certain day, when in company with another one of defendant's officers, he was on a visit to this plaintiff, plaintiff admitted to him that he was at fault, and that he himself contributed to his alleged injury, when in fact no such admissions were made. (2) Same grounds as No. 1. (3) On the grounds of newly discovered evidence, in that he had discovered since the trial the names of two or more parties who were present during the whole of the conversation between plaintiff and defendant's officers, Roden and Pearson, at their said visit, and who will and do testify that Geter made no use of the language they claimed he used, and that he used no words that could be construed to mean that he was in any manner to blame for his injuries. (4) Be-

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cause the charge given by the trial judge was partial, and calculated to bias the minds of the jury in favor of the defendant. (5) Because the oral and emphatic charge of the judge was unintentionally prejudicial to plaintiff's interest, and was calculated to bias the jury. (6) Because the trial judge constantly and repeatedly reiterated the same parts of his charge, saying the same thing over and over when in favor of the defendant, and unnecessarily emphasizing the statement that the jury should find for the defendant, and partly in support of this ground plaintiff refers to the charge as taken down by the court's official stenographer, Mr. Evans." The seventh, eighth, ninth, tenth, eleventh, and twelfth grounds were an enlargement and elaboration of ground 6, all referring to the unintentional action of the judge, creating a bias in the minds of the jury favorable to the defendant. The facts are sufficiently stated in the opinion, and as to each ground of the motion the evidence was in controversy.

FRANCIS B. NABERS, and ARTHUR L. BROWN, for appellant.—The conduct of the trial court complained of in the motion for a new trial is sufficient to base a reversal upon.—*Wheeler v. Wallace*, 53 Mich. 355; *State v. Allen*, 100 Ia. 7; 21 Ency. P. & P. 994; *Fager v. The State*, 22 Neb. 332; *State v. Coella*, 3 Wash. 99; *Griffin v. The State*, 90 Ala. 601; *Perkins v. The State*, 50 Ala. 154. Counsel discuss other assignments of error but cite no authority.

WALKER PERCY, for appellee.—The court properly overruled the motion for a new trial.—*McLeod v. Shelby Co.*, 108 Ala. 81; 4 Mayf. Dig. 315.. Counsel discuss other assignments of error but cite no authority.

TYSON, C. J.—This case was tried on the 30th day of September, 1902. On the 30th day of October following a motion for a new trial was entered. This motion was disposed of on the 30th day of June, 1905, by judgment overruling it. The bill of exceptions in the record was signed on the 18th day of October of the same year, but within the time allowed for its signing by an order

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of the court made when the motion was denied and other orders of the presiding judge made in vacation.

Many assignments of error are predicated upon exceptions reserved upon the trial not made grounds for the motion for new trial. It is clear that these cannot be considered. It is only the assignment of error based upon the ruling upon the motion that is presented for review, for the reason that the bill of exceptions can only be regarded as preserving the exception taken to that ruling.—5 Mayfield's Dig. p. 720, § 15.

The motion contained a number of grounds. The main cause of complaint seems to be aimed at the conduct of the presiding judge, which, it is asserted, was prejudicial to plaintiff's cause in the minds of the jury that tried it. His conduct, upon which is relied as sustaining the assertion, was in giving undue emphasis to certain words in his oral charge to the jury, cautioning them not to permit their sympathies to influence their verdict, etc., and in acts of familiarity with one Pearson who was a stockholder in and an officer of defendant corporation, and a witness for it on the trial of the case.

It does not appear that plaintiff reserved an exception to the charge of the court, and unless this was done he must be regarded as having waived all objections he may have had to it. He will not be allowed to speculate upon its effect upon the jury. He could not await their verdict, and, in the event it is adverse to him, complain that he was prejudiced by the charge, when he made no objection to it. The attempt to cure the omission of reserving an exception, if the charge was esteemed to be erroneous and prejudicial, by a motion for a new trial, must be regarded as wholly ineffectual. Such is not the office of a motion. In other words, a motion for a new trial cannot take the place of an exception, which could and should be properly reserved during the trial.—*McLendon v. Bush*, 127 Ala. 470, 29 South. 56, and authorities there cited; *Stewart v. Guy*, 138 Ala. 176, 34 South. 1007. This principle is also applicable and controlling with respect to the remark of the court to plaintiff's counsel as to his (plaintiff's) being able "to get his own chair" when called to the witness stand to testify in his own behalf.

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With respect to the conduct of the presiding judge towards Pearson we are not reasonably satisfied, from the evidence introduced pro and con, that this ground of the motion was proved. Undoubtedly the burden of proving the fact was upon the movant. Its occurrence was denied by Pearson and counsel for defendant, and the presiding judge found against the movant on the issue. In view of the burden of proof and the presumption of correctness which must be accorded the finding of the trial judge on this disputed issue of fact, we feel constrained to hold that we cannot affirm that this ground of the motion was well taken.

The other grounds of the motion are predicated upon surprise during the trial and newly discovered evidence. Both of these grounds are attempted to be supported by affidavits exhibited for the purpose of showing that the testimony of Pearson, who was examined as a witness by defendant, that plaintiff made certain admissions to him before the action was brought, was untrue. It appears from the bill of exceptions that plaintiff, while testifying in his own behalf on redirect examination, denied making any such admissions or statements, and that subsequently in the course of the trial the defense offered the testimony of Pearson to show that he made them. It is apparent, therefore, that there was no surprise. His own testimony shows that he anticipated that the evidence introduced by defendant would be offered; otherwise, he would hardly have denied making the statement in advance of its introduction by defendant. But, aside from this, had he not shown that he anticipated such testimony, and if surprised by it, he should have moved a continuance of the cause or a postponement of the trial. "The correct practice in such case is for the party at once, upon the discovery of the cause during the progress of the trial which operates as a surprise on him, to move a continuance or postponement of the trial, and not attempt to avail himself of the chance of obtaining a verdict on the evidence he has been able to introduce, and, if he should fail, then apply for a new trial on the ground of surprise. To tolerate such a practice would have the effect of giving to the party surprised an unreasonable

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and unfair advantage, and tend to an unnecessary and improper consumption of the time of the court.”—*Hoskins v. Hight*, 95 Ala. 284, 11 South. 253.

Suffice it to say as to the merits of the motion predicated upon newly discovered evidence, that the new evidence offered in support of the ground of the motion was merely cumulative of the plaintiff's denial that he made the statement or admission. Under all the authorities, “it is a well-settled rule that a new trial will not be granted on the ground of newly discovered evidence, when the new evidence relied on is merely cumulative to that introduced at the former trial.”—14 Ency. of Pl. & Pr. p. 811, and note 2.

Other reasons might be stated justifying the overruling of the motion on the two grounds last discussed, but those given are sufficient to affirm the ruling of the court in this case.

Affirmed.

DOWDELL, ANDERSON, and McCLELLAN, JJ., concur.

## Dunn & Lallande Brothers v. Gunn.

*Action for Damages for Personal Injury Received by  
Falling Into an Open Ditch.*

(Decided Dec. 21st, 1906. 42 So. Rep. 686.)

1. *Highways; Definition; Public Highways.*—A public highway is one established in a regular statutory proceeding, or one used by the public for twenty years or more, or one under the control of the public dedicated by the owner; and every public thoroughfare is a highway.
2. *Same; Regulation; Obstruction; Notice.*—The owner of land who permits the use of a road over it cannot place obstructions dangerous to travel in the same without giving notice to those using it, nor can he license a third person to do so.
3. *Same; Actions; Pleadings; General Issue; Special Defense.*—It was not error to sustain a demurrer to a plea denying the

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existence of a public or neighborhood road as alleged in the complaint, where the general issue had been interposed also.

4. *Same; Knowledge of Defendant.*—A plea asserting that the road referred to in the complaint was so indistinct that it did not appear to ordinary observation to be a road used by the public, is demurrable in not alleging that the defendants did not know that it was used by the public.
5. *Same.*—A plea stating that the place where plaintiff was injured was not in a town as specifically alleged in the complaint, states a defense available under the general issue; and the further allegation therein that it was not reasonably obvious to defendants that such ditch would be dangerous, but failing to state that it was not dangerous, or that defendant did not know it was dangerous, does not state a defense to the action.
6. *Same; Use of Road; Revocation of Right; Notice.*—The fact of the revocation of the right to use a road, without notice of such to persons accustomed to use it, is no defense to an action for injuries by obstructions placed thereon.
7. *Damages; Personal Injuries; Evidence Amount of Damages.*—It was permissible to show that plaintiff, who was a physician could not care for his practice as conveniently and agreeably, and what was the average amount of his practice per month, before the injury, as an element of damage.
8. *Same; Admissibility on the Pleadings.*—The complaint not alleging damages because of loss of business, it was incompetent to show the decrease in the physician's practice, and the impairment of his ability to practice.
9. *Evidence; Opinions; Injuries; Ability to Practice Medicine.*—It was incompetent for the physician to testify as to his opinion as to what per cent his ability to practice his profession had been decreased by his injuries.
10. *Same; Hearsay; Notice to Partner.*—It is hearsay or opinion evidence for a partner to state that his partner, or the firm, had never been notified of a certain fact, and inadmissible.
11. *Highways; Obstructions; Owner of Property; Authority to Obstruct.*—The fact that the owner of the property had authorized defendant to cut a ditch across a road over said property used by the public would not authorize the cutting of said ditch in such a manner as to endanger a traveller along the road in the night.
12. *Principal and Agent; Authority of Agent; Superintendent.*—One who is superintendent only of the lime works of his employer, has no authority by virtue of such agency to authorize the cutting of a ditch across the road over his employer's property.

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APPEAL from Shelby Circuit Court.

Heard before Hon. A. H. ALSTON.

Action by J. H. Gunn against Dunn & Lallande Bros. Judgment for plaintiff, and defendants appeal. Reversed.

The nature of the suit and the substance of the complaint is sufficiently set out in the opinion. The second count simply alleges that the excavation was made across a road or way which was generally used and traveled by the public in going to and returning from the town or village of Longview, and that it was a much traveled roadway was obvious and apparent. The third count describes the roadway as a public highway.

Demurrers were interposed to these complaints as follows: "Said complaint shows no facts entitling plaintiff to maintain the suit. No facts are shown imposing any duty on these defendants to plaintiff in reference to the matter complained of. No facts are alleged from which any duty to plaintiff on the part of these defendants arose. There was no averment that the road was a public road. For aught that appears, the plaintiff was a trespasser in the use he was making of the alleged road. For aught that appears, the excavation alleged was only a legitimate use of land by the owner or by his authority. For aught that appears, plaintiff was guilty of negligence which contributed to his injury, in that in the nighttime he undertook to go across private land, where he had no right to be, in a buggy or vehicle, without ascertaining whether he could safely so do. It appears that the excavation alleged was not such as would likely or probably cause injury to one passing along the alleged roadway. It does not appear that the excavation or surroundings were such as would suggest danger, or as required or suggested 'precaution to prevent pedestrians or people driving or on horseback from falling into the same.'" Said count shows that the excavation alleged was not the proximate cause of plaintiff's injury. It appears that the proximate cause of plaintiff's injury was the kick of a horse. It does not appear that the negligence of these defendants was the proximate cause of the injury complained of. It appears that the injuries sustained were the re-

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sult of falling out or partially out of the buggy or vehicle, which it was alleged was caused by the excavation and the action of plaintiff's horse in kicking him. It appears that plaintiff drove or was carried into the excavation of 12 to 15 inches with great force and violence, and that his injuries were caused by the great force and violence with which he was driving, or with which his horse was carrying him. It appears that plaintiff was driving in a careless and negligent manner. It does not appear that defendant had notice of any defect that would render the excavation dangerous or likely to produce harm. It does not appear that the excavation was per se dangerous, or that defendant had notice of facts that would probably render it so. It does not appear that the excavation was such as would have suggested danger, or would have been dangerous to an ordinarily prudent person driving in a prudent manner. It does not appear that the plaintiff or the public had any right, by license, prescription, or consent of owner, or otherwise, to travel where plaintiff was traveling, nor any reason why the owner of the land or these defendants owed plaintiff any duty relative thereto." The above demurrers were filed to the second and third counts, with the following additional demurrers to the second count: "It appears that the excavation was made in the repairing or construction of a railroad bed, and it does not appear but that said excavation was on the right of way of the railroad company for whom such excavation was made. It appears that the excavation was on a railroad right of way, and that plaintiff was a trespasser."

After demurrers were overruled, the defendant filed a number of pleas, to some of which demurrers were sustained, which pleas are as follows: Plea 2: "That there was no neighborhood road, or public highway, leading from Longview Station to said Calera and Pelham public road." Plea 5: "That said alleged road, if any, in said complaint mentioned, was so dim and indistinct that it did not appear to ordinary observation to be a road used by the public." Plea 8: "That the place where plaintiff is alleged to have been injured was not in a town, city, or village, and the ground at



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such time was low and level, and it was not reasonably obvious to the defendant that such would be dangerous to persons passing along said alleged road in vehicles; said ditch or excavation being wide and shallow, with sloping sides." Plea 9: "At the time it is alleged that defendants cut said ditch it was not reasonably obvious to them that such ditch would be dangerous to persons crossing the same in vehicles on said alleged road." Plea 10: "That said alleged neighborhood road was not a public highway, either by grant, prescription, or dedication, but was only used by permission or toleration of the owner of the land over which the same passed, and that at the time of plaintiff's alleged injury the owner had reclaimed the same and revoked said permission."

The other pleas, to which demurrers were overruled, set up that at the time the alleged ditch was cut the defendants had no notice or knowledge of any road for vehicles along or over the land at the place where it is alleged that plaintiff was injured; that at the time the ditch was cut it was done by authority of the owner of the land, and at that time it did not appear that there was any road for vehicles, and no marks or other sign to indicate that it was used as a road for vehicles, and that defendant had no knowledge that it was so used; that the place where said ditch was cut was a place of natural drainage, and that the ditch was excavated only 10 inches and with sloping sides, and was used to facilitate the drainage, and was not apparently dangerous to persons passing over or along said land; that it was not dangerous, as it was excavated, to persons crossing the same on vehicles. The other pleas were pleas of contributory negligence, setting up that there was another and safe way known to plaintiff, and that he negligently used this way in the nighttime and without proper care to ascertain if it was all right, rather than the known, safe way.

Evidence was introduced tending to support the allegations of the complaint, and there was evidence also tending to support the pleas to which demurrers were not sustained. The assignments of error relating to the admission of testimony are sufficiently set out in the

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opinion. In answering question number 2 in the opinion, the plaintiff stated that his practice as a physician had decreased 20 per cent. There was motion to exclude this answer, which was overruled. The witness made the same answer to question 3 as noted in the opinion. Question No. 5, noted in the opinion, was answered as follows: "My practice before I was injured amounted to about \$150 on an average." Motion was made and overruled, to exclude both of these answers, separately. The following questions were propounded to E. J. Dunn, a witness for the defendant, and objection was sustained to each separately: "While the work was progressing, during the construction of said railroad, and before said ditch was cut, and before plaintiff was injured, was Mr. P. H. Lallande notified in any manner, or informed, that there was a neighborhood road, or a road for the passing of vehicles, over said land, which was crossed by said ditch?" "Was the firm of Dunn & Lallande Bros. informed or notified in any way, while said ditch was being constructed, that the same crossed a road, a neighborhood road, or a road used by vehicles?" Also, if his firm had ever been notified of the existence of any such road at any time before the plaintiff was injured.

At the conclusion of the testimony, the plaintiff requested the following charges which the court gave:

"(1a) The court charges the jury that if they are reasonably satisfied from the evidence that the plaintiff, when traveling said road at the time when he attempted to cross said ditch, acted as a reasonably prudent man would have acted under the same circumstances, then he was not guilty of negligence."

"(2b) The burden of proof is on the defendant to make out their pleas of contributory negligence to the reasonable satisfaction of the jury."

"(3c) The court charges the jury that if they are reasonably satisfied from the evidence that the plaintiff, in attempting to cross said ditch, acted as a reasonably prudent man would have acted under similar circumstances, then he was not guilty of contributory negligence."

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"(4d) The court charges the jury that it was not necessarily negligent as a matter of law for the plaintiff to have driven as the evidence showed he was driving at the time he was attempting to cross said ditch."

"(5e) The court charges the jury that it is for them to decide, from all the evidence in the case, whether the plaintiff was guilty of contributory negligence as averred in the complaint."

The following charges were refused to the defendants:

(1) General affirmative charge.

"(2) The court charges the jury that if the plaintiff saw and crossed the ditch a short while before the injury, and was in a few yards of the place of such injury, and at the time of the injury drove into the ditch in the dark and without a light, and that, had defendants had a light, he would have seen the ditch and the injury been avoided, the jury must find for the defendants.

"(3) The court charges the jury that if they believe the evidence of Dr. Gunn, taken in connection with all the other testimony, then he had notice of the existence of the ditch at the place of the injury, and he cannot recover.

"(4) The court charges the jury that if the plaintiff saw and crossed the ditch within 45 or 50 feet of the place of the accident a short while before the accident occurred, and drove into the ditch in the dark and without a light, then they must find for the defendant.

"(5) If the jury believe from the evidence that the defendants had no notice or knowledge, at the time said ditch was cut or scraped out, of the existence of any road for vehicles over the land where the plaintiff was injured, they must find for the defendant."

There were other charges presenting the same proposition in different ways and the following on other propositions:

"(28) If the jury believe from the evidence that the cutting of the ditch at the place where the injury occurred was reasonably necessary for the proper construction of the railroad, then it is not negligence for the

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defendant to cut or have authorized the cutting of the same."

(29) Same as 28, except that it required that the jury could not find that the defendant was guilty of negligence in cutting the ditch.

The other charges requested were the affirmative charges as to each count and as to the defendants separately and jointly.

There was jury and verdict for the plaintiff for \$4,450.

WHITSON & DRYER, and BROWN & LEEPER, for appellant.—The proof in this case failed to show that the road was a neighborhood road open to the use of all but kept in repair and subject to the control of persons in the neighborhood.—15 A. & E. Ency. of Law, p. 352. Where there is a license simply not coupled with an interest in the road it may be revoked at any time, even though under seal.—18 A. & E. Ency. of Law, p. 1143-44. A license or permission to pass over land is revokable.—*Noftsgier v. Burkdall*, 148 Ind. 531; *Parrish v. Kaspure*, 109 Ind. 586. The court erred in reference to the testimony as to the plaintiff's ability to practice medicine as conveniently and agreeably as before his injuries.—*M. & E. R. R. Co. v. Mallett*, 92 Ala. 209. The court erred in reference to the admission of testimony of the decrease in plaintiff's practice in the future.—*Pulliam v. Schimpf*, 109 Ala. 184; *Gandy v. Humphries*, 35 Ala. 617. The damage sought to be proven are special damages not necessarily resulting from injury and could not be recovered for under the complaint.—*A. G. S. R. R. Co. v. Tapia*, 94 Ala. 227; *Dowdell v. King*, 97 Ala. 635; *Boggan v. Bennett*, 102 Ala. 400; *Ross v. Malome*, 97 Ala. 529. The part of the oral charge marked J was not within the issue.—*Bir. Ry. & Elec. Co. v. City Stables*, 119 Ala. 615. A want of knowledge respecting a disputed fact where a witness has opportunity of knowing such fact if it existed is competent evidence.—*Nelson v. Iverson*, 24 Ala. 9; *Blakey v. Blakey*, 33 Ala. 611; *Killen v. Lido*, 65 Ala. 505. The court's attention is specially called to the case of *Peters v. Southern Ry.*

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Co. on the proposition that the appellant was entitled to the affirmative charge.

FRANK S. WHITE & SONS, for appellee.—The following authorities hold that it is actionable to make excavations in or near a traveled road or path, even by the owner without notice or warning to those who are accustomed to travel the same and that it is not at all necessary that it should be a public road. If this be true each count stated a cause of action and the demurrers were properly overruled.—1 Thompson on Negligence, § 1016; *Lewman v. Anderson*, 129 Ala. 170; *Graves v. Thomas*, 48 Am. Rep. 727; *Wheeler v. St. Joseph*, 2 Mo. App. 1319; *Lepnio v. Gaddis*, 72 Miss. 260; *Morrow v. Sweeney*, 10 Ind. App. 626; *Oliver v. Worcester*, 102 Mass. 489; *Beck v. Carter*, 68 N. Y. 283; *Corby v. Hill*, 4 C. B. 556. The court properly sustained demurrer to the 2nd plea.—*Stevenson v. Wright*, 111 Ala. 579. If the plaintiff's earnings are the result of professional skill or services the amount he has realized for a series of years shows what he is worth to himself and what he was capable of earning and affords the best basis on which the jury can estimate his loss from inability to follow his vocation.—*Alabama Great Southern R. R. Co. v. Yarbrough*, 83 Ala. 238; *A. G. S. R. R. Co. v. Frazer*, 93 Ala. 45; *Seaboard Mfg. Co. v. Woodson*, 98 Ala. 383. The damages sought to be proved by plaintiff were general and not special damages.—*Wade v. Leroy*, 20 Howard 34; *Luck v. Rippon*, 52 Wis. 200; *T. C. R. R. Co. v. Burnett*, 80 Tex. 536; *Herbert v. Beddel*, 21 N. Y. Sup. 305; *Ehrgott v. New York*, 96 N. Y. 264.

HARALSON, J.—In its merits this cause of action is simple, and is for the recovery of damages for personal injuries caused by the alleged negligence of defendants in cutting a ditch across a road, which had been for many years traveled by the public generally, on foot, on horseback and in vehicles, and negligently leaving it open, without taking sufficient precaution to prevent persons driving on said road from falling into the same.

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This preliminary statement is made as justifying the course we take in not considering the many assignments of error in detail, since it would be almost interminable to do so, and in confining ourselves to such errors as are insisted on in argument and which relate to the real merits of the case.

The assignments of error are but few short of 100, and the transcript is very voluminous.

1. There were three counts in the complaint. The first alleges in substance, "that on and prior to the 22d of February, 1903, there was a neighborhood road leading from Longview Station in said county (Shelby) to the public road, running from Calera to Pelham, Ala.; that said road was then and had been for many years used by the public generally as a way or means of passage on foot, on horseback and in vehicles from Longview Station to said public road; that defendants within a short time prior to said date, made an excavation in or across said roadway where it passes through the town of village of Longview, from 12 to 15 inches deep, and from 5 to 6 feet wide, and negligently left said excavation open, without taking sufficient precaution to prevent pedestrians or people driving, or on horseback from falling into the same;" that while plaintiff was passing over said road at night, in a buggy drawn by one horse, his buggy was drawn or carried into said excavation with great force and violence, throwing him out or partially out of said buggy or vehicle, when he was kicked by the horse drawing said buggy, and on account thereof together with said fall, his body was greatly bruised, wounded, lacerated, etc.; that he was made sore, sick and lame; that being a practicing physician and surgeon, he has been caused to lose a great deal of time from his professional employment; had to spend a large sum of money in effecting and trying to effect a cure of his said injuries; has suffered great inconvenience, physical pain and mental anguish on account thereof, and has been permanently disabled and injured, wherefore he sues, claiming damages as said.

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The second count is practically the same as the first, except that it does not charge that the road was a neighborhood road.

The third differs but little from the first count. The cause of action as therein stated, and the damages claimed are in substance and effect the same as in the first. The averment is made that "the damages are particularly set out in the first count of the complaint to which reference is hereby made, to his damages aforesaid." This averment, of course, sets out by adoption, the averment of the first count, that plaintiff was a practicing physician and his loss of time and practice therein stated from said injuries.

The counts of the complaint were demurred to, on some 20-odd grounds, and the demurrers were overruled.

2. A public highway, as contradistinguished from a private highway, is one under the control and kept by the public; dedicated for that purpose by the owner; used by the public for 20 years, or, established in a regular proceeding for that purpose.—*Lewman v. Andrews*, 129 Ala. 174, 29 South. 692.

Every public thoroughfare is a highway, and a way open to all the people is a highway, whether it is strictly speaking public or private.

"Roads generally used by the citizens of a locality, but open to the general public, are public roads, although they may afford facilities for travel to only such persons as reside in the neighborhood, and may not be useful to the general public. \* \* \* The character of the road does not depend upon its length, nor upon the places to which it leads, nor is its character determined by the number of persons who actually travel upon it. If it is free and common to all the citizens, then, no matter whether it is or is not of great length, or whether it leads to or from city, village or hamlet, or whether it is much or little used, it is a public road."—*Elliott on Roads & Streets*, §§ 11, 1, 3.

If the owner of land permits the public, or individuals to travel on his land on a way or road such as is described in the complaint, he cannot make pitfalls, or place dangerous obstructions in the traveled way, without first giving notice or warning to those making use

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of the way. It that be so, a third person could not acquire the right to do so, under the owner's license or permission. So, if the railroad company, over whose right of way this road ran, could not obstruct the same, without notice to those it had allowed and those invited to travel over it, the defendants could not, even by the license or authority of the owners of the land, have dug this ditch, if the same was a dangerous obstruction, without notice of its existence.

A leading English case, similar in its general features to the one in hand, is that of *Corby v. Hill*, 4 Eng. Com. Law Reports, 554. Cockburn, C. J., in his opinion says: "The proprietors of the soil held out an allurement whereby the plaintiff was induced to come upon the place in question: they held out this road to all persons having occasion to proceed to the asylum (to which place the private road led), as the means of access thereto. Could they have justified the placing of an obstruction across the way, whereby an injury was occasioned to one using the way by their invitation? Clearly they could not. \* \* \* If that be so, a third person could not acquire the right to do so under their license or permission." And Wiles, J., in his opinion in the same case, says: "The defendant (who was not the owner of the land, but who had permission of the owner to place building material on the road which ran over the land) had no right to set a trap for plaintiff. One who comes upon another's land, by the owner's permission or invitation has a right to expect that the owner will not dig the pit thereon, or permit another to dig a pit thereon, so that persons lawfully coming thereon may receive injury." To the same effect in principle, see 1 Thompson on Negligence, § 1016.

From the foregoing it will appear, that the complaint, in its several counts, states a good cause of action, and the demurrers were properly overruled.

3. The defendants filed pleas numbered from 1 to 19 inclusive. The court sustained demurrers to pleas 2, 5, 8, 9 and 10, and overruled them as to the others.

The first plea was the general issue. The second averred, that there was no neighborhood or public highway from Longview to the public road to Calera, as alleged



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in the complaint. The first count averred that the road so leading from Longview to said public road was a neighborhood road, and the third count that it was a public road. This plea denying that there was a neighborhood or public road must, therefore, be construed as presenting the same defense as the general issue already pleaded in the first plea. The burden was already on the plaintiff, under the plea of the general issue, to prove that it was a neighborhood or public highway leading from Longview to the public road to Calera, and all that is pleaded by said second plea, was available in defense under the plea of the general issue. The second count did not aver that it was a neighborhood or a public road, but simply that it was a road used generally by the public. The plea did not confess, avoid or deny the allegations of the second count.

The fifth plea set up, that said road, if any, as referred to in the complaint, was so dim and indistinct that it did not appear to ordinary observation to be a road used by the public. The plea does not set up that defendants did not know that the road was traveled by the public. If they knew that it was traveled by the public, it would seem that it made no difference, if it was dim and indistinct. A road may be dim and indistinct, especially at night, and yet be one which is traveled by the public.

What is said above applies with equal force to the eighth plea. Furthermore, the counts in the complaint aver that the place of the injury was in the village of Longview, which the plea denies. The plea was in effect the general issue, as all set up in it was provable under the general issue.

The ninth plea sets up, that at the time defendants cut said ditch, it was not reasonably obvious to them that the same would be dangerous to persons crossing it traveling in vehicles along said road. It would occur to the ordinary mind, that if the defendants cut a ditch across said road, which was in fact dangerous to persons traveling in vehicles, to cross it, it could make no difference whether it appeared to defendants to be dangerous or not. They were responsible for the ditch, as it was actually cut, if it was a dangerous impediment

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to travel, and liable to inflict injury on those passing, notwithstanding it did not appear to them, the defendants, to be dangerous. Not how the ditch appeared to defendants, as being dangerous or not, but its actual liability to do damage to others in passing over it, is the real point to be considered.

The tenth plea set up an immaterial issue. Revoking the right or revoking the permission to travel on said road, without notice by the owner to travelers, of such revocation, would not answer the claim of one injured without such notice.

Under the head of "Duty to Warn the Public of Revocation of License to Come upon One's Premises," Mr. Thompson says: "It is a sound and just conclusion that all owners or occupiers of land who has given to the public or to any particular person or corporation a license to come upon or to cross his premises, or to establish a private way or even a railway thereon, must, before exercising his power to revoke such license, anticipate that danger may occur therefrom to those who may be accustomed to use the license, and is therefore bound to notify them of such revocation, and to warn them of any fence, obstruction, or other dangerous means to which he may have resorted to exclude them from his premises."—1 Thompson on Negligence, § 1016, and many authorities there cited. It is not averred in the plea, when or how the revocation was made, nor that any notice was given to plaintiff or to any persons who were permitted to travel the road. For aught appearing, it may have been done only a brief time, and how long before the injury was inflicted on plaintiff, does not appear. The demurrer to the plea was properly sustained.

4. The sixteenth to twenty-fifth assignments of error, relate to the admission of testimony, having relation to the damage plaintiff sustained. The following questions which for convenience we number, were propounded by his attorney to the plaintiff, while being examined as a witness in his own behalf: "(1) Can you do your practice as conveniently and as agreeably as you could before you were injured? (2) State what per cent. your practice has decreased since you were injured. (3) You stated in your cross-examination that

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your skill as a physician is as great now as it was before you were injured. Please state if your ability to prosecute your profession is as great now as it was before you were injured, and if not, what per cent. has your ability to practice your profession decreased since you were injured. (4) State what amount had been your average practice per month before you were injured. (5) What per cent. has the average amount per month you make out of your practice decreased since you were injured?"

The questions numbered 1 and 4 called for competent and legal evidence, and the objections to them were properly overruled. Those numbered 2 and 5 called for irrelevant testimony, such as was not within the issue made up by the pleadings. The complaint does not claim damages on account of loss of business sustained by the plaintiff on account of the injuries sustained by him. But, we are not to be understood as committing ourselves to the proposition, that such damages would be recoverable, even if laid in the complaint. The motion to exclude the answer to the 3rd question should have been sustained, for the same reason as above laid down for sustaining objections to questions 2 and 5, as not being within the issues made by the pleadings, and, in that it expressed the mere opinion of the witness.—*Hames v. Brownlee*, 63 Ala. 277; *A. G. S. R. R. Co. v. Tapia*, 94 Ala. 230, 10 South. 236.

5. Objection to questions propounded by defendants' counsel to witness E. J. Dunn, one of the defendants, while being examined as a witness as appears on pages 118 and 119 of the record, constituting assignments of error 26 and 27, were properly sustained. The witness was not asked what he knew, or of what he had been informed, and otherwise he could not know except by hearsay or opinion, what his partner or firm knew or did not know, or of what they were or were not informed. Witness was not all the time with the parties in charge of the work, and could not personally know what they had or had not been informed.—*Bailey v. State*, 107 Ala. 153, 18 South. 234. The court was fair enough in making its ruling, to state, that if the witness knew of any facts tending to show that either his

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partner or firm did not know of the existence of the road, he could testify to such facts.

6. It appears that J. B. Adams owned and operated the Longview Lime Works, and the land immediately around Longview Station, on which the road in question existed. He was a nonresident and conducted his business through a superintendent, and defendants claimed to have had authority from such superintendent to cut the ditch across this road. Adams was asked by plaintiff, examined as one of his witnesses: "Did your superintendent have any authority from you, to give any one the right to cut a ditch along or over your land where this ditch was cut?" To this question defendants interposed several objections (Record, p. 122) which were overruled. Witness answered, that he did not. The fact that the superintendent of the lime works had no authority to authorize the cutting of this ditch by defendants was competent to be shown, if that were important; but, if it were true that this superintendent did allow defendants to cut it, that fact would not authorize them to so cut it, as to endanger a traveler along the road in the nighttime, who had no notice of the existence of the ditch. Moreover, if the superintendent of the lime works, was not the general superintendent of Adams, of all his business in this state, he had no authority, by virtue of being superintendent of the lime works, to interfere in this outside matter, which had no connection with the lime works.

7. After the conclusion of the evidence, the bill of exceptions states: "The court, at the request of the defendants' counsel made before the argument began, charged the jury in writing as follows." Here follows the written charge. It is not a violent construction of this language, to hold, that this written charge, as given, was prepared and requested by defendants' counsel, and not that it was a request for the court to charge the jury in writing as provided by section 3327 of the Code. If this is a proper construction of the request under consideration, it was not competent for counsel to afterwards except to portions of the charge, as they did. It may be said, however, that this construction is technical, and that it is obvious that the intention was

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intended to be a request for the court to charge in writing. Lest we may do injustice to the defendant, we will add, that we have examined the portions of said charge excepted to, under the authorities above cited, when construed in connection with other portions, and with all of said charge, we find no error in them.

The court gave at the requested of the plaintiff, five written charges numbered 1a, 2b, 3c, 4d, and 5e (pages 145, 146 of record). We have examined each of these charges, and under the authorities above quoted, fail to find reversible error in any of them.

9. The court gave 12 charges requested by the defendants, and refused 24 (pages 147, 151, 157 and 158). A careful review of said charges so refused, fails to disclose error in any of them. It is proper to remark, that a review of these charges to show their faults, would involve a great expenditure of time and trouble without any profit.

Reversed and remanded.

TYSON, C. J., and SIMPSON and DENSON, JJ., concur.

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### *Damages for Injury on Account of Defect in Street.*

(Decided Feb. 14th, 1907. 43 So. Rep. 94.)

1. *Municipal Corporations; Sidewalks; Duty to Keep in Repair.*—Under its charter (Acts 1900-01, p. 2342) it is the duty of the City of Mobile to keep its entire streets and sidewalks in reasonably safe condition for public travel.
2. *Same; Knowledge of Defect in Injured Party.*—Knowledge by a pedestrian of a defect in a sidewalk or street does not affect his right to use such walk or street, nor to recover for injuries caused by the defect, unless negligent in the manner of travelling thereon, where the city charter requires that it keep its walks and streets in safe condition.
3. *Same; Instructions.*—The defendant set up by plea that there was about seven feet of the sidewalk from the hole thereon

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to the abutting property line that was safe for pedestrians and that the plaintiff contributed to her injury by failing to use the safe way and choosing the unsafe way, but the evidence failed to establish the plea. Held not reversible error to charge that if the sidewalk was not safe for about seven feet from the inside of the hole to the property line, for the passage of pedestrians, the defendant's plea of contributory negligence falls.

APPEAL from Mobile City Court.

Heard before Hon. SAMUEL B. BROWNE.

Action by Florence C. Shaw against the city of Mobile. From a judgment for plaintiff, defendant appeals. Affirmed.

This was an action begun by the appellee for damages resulting from falling into a hole on a sidewalk, or near the sidewalk, of the appellant. The negligence alleged is the failure to have that part of the street sufficiently lighted, and for failure to repair the defect, which had been known to exist for some time. Proof of presentation of claim duly verified by affidavit was made. The facts on which the action is based and the defense thereto are sufficiently stated in the opinion.

Charge 5, given at the request of the plaintiff, is as follows: "(5) The court charges the jury that, although they may believe the plaintiff knew of the defects in the sidewalk, that constitutes no legal reason why she should not use the sidewalk, and as a citizen she had the legal right to use said sidewalk, notwithstanding the defects, and such use of the sidewalk, in case of injury, would not, unless she was negligent in the manner of traveling thereon, affect her right to recover full damages."

There was verdict for the plaintiff in the sum of \$879.

B. B. BOONE, for appellant.—The case of *Gosport v. Evans*, 112 Ind. 133, and the cases there cited maintain the position taken by appellant in this case. The question of negligence should have been submitted to the jury.—*City Council v. Wright*, 72 Ala. 411; *L. & N. R. Co. v. Hawkins*, 92 Ala. 241. On these same author-

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ities charge 5 given at the request of the appellee was error.

CHARLES L. BROMBERG, for appellee.—The following cases show that the law is adverse to the contention of the appellant: *Government St. Ry. Co. v. Hanlon*, 53 Ala. 81; *City v. Wright*, 72 Ala. 420; *Birmingham v. Tayloe*, 105 Ala. 176; *Mosheuer v. District of Columbia*, 191 U. S. 247. Charge 3 was properly given.—*Birmingham v. Tayloe*, *supra*; *Mayor, etc. v. Starr*, 102 Ala. 805. Charge 5 was properly given.—Authorities *supra*.

HARALSON, J.—The city charter of Mobile imposes upon the municipality the duty of repairing and keeping in order the streets of the city and their proper lighting at night.—Acts 1900-01, p. 2342.

It was the duty of the municipal corporation to keep the streets and sidewalks in a reasonably safe condition for travel, and for the use of its citizens and the public generally; and this duty extended to the entire width of the streets and sidewalks appropriated to such use and purposes.—*Mayor and Aldermen v. Tayloe*, 105 Ala. 176, 16 South. 576; *Lord v. City of Mobile*, 113 Ala. 360, 21 South. 366.

In the *Town of Cullman v. McMinn*, 109 Ala. 615, 19 South. 981, it was said: "The liability of municipal corporations for injuries to persons lawfully using the streets, caused by defects or obstructions therein, springs from the duty, imposed upon them by law to keep the streets in a safe condition for public use. It is said by Judge Dillon: 'Where the duty to keep its streets in safe condition rests upon the corporation, it is liable for injuries caused by its neglect or omission to keep the streets in repair, as well as those caused by defects occasioned by the wrongful acts of others, but, as the basis of the action of negligence, notice to the corporation of the defect which caused the injury, or the facts from which notice thereof may reasonably be inferred, or proof of circumstances from which it appears that the defect ought to have been known and remedied by it, is essential to the liability.'—2 Dillon, Mun. Cor. (4th

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Ed.) § 1034; *City Council v. Wright*; 72 Ala. 411, 47 Am. Rep. 422."

In *Town of Gosport v. Evans*, 112 Ind. 138, 13 N. E. 256, 2 Am. St. Rep. 164, it was well said, consonant with our own decisions on the subject: "We do not question the doctrine of the cases which hold that because one has knowledge that a highway or sidewalk is out of repair, or even dangerous, he is not therefore bound to forego travel upon such highway or sidewalk. (Citing cases.) The doctrine to be extracted from these cases is, that although a sidewalk or highway may be in an apparently defective or dangerous condition, yet a person with knowledge of the defect or danger is not on that account obliged to abandon travel upon the highway, if, by the exercise of care proportionate to the known danger, he may reasonably expect to shun or avoid the defect. If the defect be one which does not render the way wholly irreparable, and which can only result injuriously to the traveler if not shunned, if there be an apparently safe way of passage without going into the obvious defect, the traveler is not to be held to a rigorous account, if he is deceived or misled notwithstanding his effort to avoid the danger."

In the case of *City Council v. Wright*, *supra*, the principle is announced in substance that "when the evidence shows that the route selected by plaintiff, at the time he was injured by the fall caused by a 'wash-out' in the sidewalk, was the route ordinarily traveled with safety by all persons on foot going in that direction; that the sidewalk at that point was wide enough for safe passage on the inside of the 'wash-out,' and that there was no sidewalk on the other side of the street, contributory negligence cannot be imputed to him, because he had knowledge of the defect in the sidewalk, and did not select a different route."

The evidence is practically without conflict. The accident occurred at night when it was very dark, and no lights sufficient to make the way plain were maintained. There was no curbing to the sidewalk, and a ditch ran along the outer edge, which some evidence tends to show was 5 or 6 feet deep, and in this ditch was a hole, into which the plaintiff fell. This condition had exist-



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ed for a number of years, and, as is shown, was known to the city authorities, and the plaintiff herself knew the place which she, and the public generally, were in the habit of passing. There was no curbing to the sidewalk at the place of the accident, and there was a step down estimated at from 15 to 18 inches. At the time plaintiff fell, there was a plank over this step-off, which had been there, as one of the witnesses deposed, "pretty much all the time," and this plank was used by bicyclists, and by the people in walking upon it as they passed it. The plaintiff, as the evidence showed, in using the sidewalk at this place, in order to avoid stepping down the abrupt descent to the sidewalk below, did the ordinary thing, by walking on this plank, so used by travelers along that way, and when she got to the end of the plank, the earth gave way, and the edge of the sidewalk caved in, causing her to fall into said hole in the ditch, thereby causing her the injuries of which she complains.

The defendant pleaded the general issue, and a special plea, numbered 2, of contributory negligence of the plaintiff, which set up, that there was about seven feet of said sidewalk from the edge of the said hole to the property line abutting said sidewalk which was safe for the passage of pedestrians; "that plaintiff having knowledge that the outer edge or part of said sidewalk was unsafe, nevertheless negligently walked upon it, and fell in said hole therein, thereby by her negligence as aforesaid, directly and proximately contributed to her said alleged injuries."

The court at the instance of the plaintiff gave the two charges numbered 5 and 6, and no other errors are assigned except in the giving of these charges.

Charge 5 is fully sustained by the authorities to which we have referred above, and there was no error in giving it.

The sixth charge, instructed the jury, "that if they believed from the evidence that the sidewalk, where the injury occurred, was not safe for about seven (7) feet on the inside (from the ditch or hole) towards the property line for the passage of pedestrians, that the defendant's plea of contributory negligence fails and is of no avail."

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The charge was evidently intended to submit to the jury an issue of fact on the allegation of defendant's plea of contributory negligence, viz., "that there was about seven (7) feet of sidewalk from the edge of said hole to the property line abutting said sidewalk which was safe for the passage of pedestrians." The object of this averment was to show that plaintiff abandoned or failed to take a safe route, open to her, and chose an unsafe way and thereby contributed to her injury; and the charge was, if the jury did not believe such averment, then said plea failed.

The evidence in its tendencies fails to establish the averments of the plea in this respect. Indeed, it tends to show that the whole of said sidewalk, at the time of the accident was unsafe. While it did not appear, that any particular seven feet was unsafe, as averred in said plea, it was open to the jury to find that the averments of said plea in this respect were not shown to be true. It was fairly open to such an inference, and it became a question for the jury to decide.—*Holmes v. B. S. R. Co.*, 140 Ala. 209, 37 South. 338; *Mouton v. L. & N. R. R. Co.*, 128 Ala. 539, 29 South. 602.

Our conclusion is, that there was no reversible error in giving the sixth charge.

Affirmed.

TYSON, C. J., and DOWDELL and SIMPSON, JJ., concur.

## Hervey, et al. v. Hart.

*Action for Damages Against Innkeeper by Guest.*

(Decided Dec. 18th, 1906. 42 So. Rep. 1013.)

1. *Innkeepers; Duty as to Furnishing Accommodations.*—In the absence of special contract under Section 2539, Code 1896, the common law rule measures the liability of an innkeeper, and while he may assign the guest to another proper apartment, he may not put him out of the apartment assigned him and

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refuse to furnish him other proper accommodations.

2. *Appeal; Review; Granting New Trial.*—Unless the evidence plainly supports the verdict, the granting of a new trial for insufficient evidence will not be reviewed.

APPEAL from Mobile Circuit Court.

Heard before Hon. SAMUEL B. BROWNE.

Action by Loui Hart against Frank A. Hervey and others. Plaintiff was granted a new trial, and defendants appeal. Affirmed.

The cause of action as stated in the complaint was as follows: "Plaintiff claims of the defendant the sum of five thousand dollars damages, for that heretofore, to-wit, on the 15th day of February, 1904, the defendants were the keepers of an inn known as the 'Bienville Hotel' in the city of Mobile, and plaintiff, being then and there a traveler, applied to defendants to become a guest of said inn, and was by the defendants accepted as such guest and assigned a bed in a room numbered as 'Parlor A,' and after he had been so assigned to said room, and his baggage placed therein, he had occasion to be temporarily absent from said room, and while so absent, defendants caused plaintiff's baggage to be removed from said room, and upon plaintiff's return to said inn defendants refused to allow him the use of said room to which he had been assigned, and refused to furnish him any other proper accommodations, although it was then late in the night, and the city of Mobile was crowded with people visiting the Mardi Gras festivities, and defendants well knew that it was probably impossible for plaintiff to obtain, at that time, accommodations at any other inn in said city; and plaintiff avers that he was compelled to wander about the city for the greater portion of the night, seeking a place to sleep, and was wholly unable to obtain any accommodations until nearly morning, and that he was greatly mortified and his feelings hurt by his said treatment; that he was sick and greatly suffered, and was made tired by the exposure and effort necessarily made to obtain accommodations elsewhere, and was put to great expense for hack hire in driving from place to place seeking accom-

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modations as aforesaid; all to his damage \$5,000." Issue was joined upon the general issue.

ERWIN & MCALDER, for appellant.—An innkeeper has the right to remove a guest from one room to another provided the accommodation in the room to which he is removed are proper and suitable.—16 A. & E. Ency. of Law, (2nd Ed.) 524, note 4. Counsel discuss the granting by the court of a new trial to plaintiff, together with the evidence but cite no authority.

GREGORY L. & H. T. SMITH, for appellee.—The rule is, that this court will not reverse a judgment granting a motion for a new trial unless the evidence plainly and palpably supports the verdict.—*Merril v. Brantley*, 133 Ala. 530; *Smith v. T. & N. R. R. Co.*, 141 Ala. 332. Counsel discuss other assignments of error but cite no authority.

HARALSON, J.—Our statutes on the liability of innkeepers, provide that "in the absence of a special contract as is authorized by the succeeding section (2540) the right of guests and the liability of the keeper remain as at common law."—Code 1896, § 2539.

The succeeding section, authorizes a special contract in writing between an inn or hotel keeper and guest, by which the liabilities of the parties may be regulated. It is unnecessary to set out this section, as there is no pretense, that there was any such contract between the plaintiff and defendants in this case. In *Beale v. Posey*, 72 Ala. 330, construing these sections, the court said: "The purpose of the statute is, to confer on the keeper of the unlicensed house of public entertainment the liability of receiving only such guests or boarders as may enter into a special contract with him. But if the keeper of such house does not enter into a special contract with the guest, furnishing him a memorandum thereof in print or in writing, limiting his liability, the common law intervenes, and from that, the measure of his liability must be ascertained.—*Lanier v. Youngblood*, 73 Ala. 587.

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In *Doyle v. Walker*, 26 U. C. J. B. 502, it was held, as the common law on the subject, that the innkeeper has the right and the sole right to select the apartment for a guest, and, if he finds it expedient, to change the apartment and assign the guest another, without becoming a trespasser in making the change. If, having the necessary convenience, he refuses to afford reasonable accommodations, he is liable to an action for damages.—16 Am. & Eng. Ency. Law (2d Ed.) 524, 525.

The plaintiff in this case, the appellee here, sued the defendants, who are appellants, to recover damages for the alleged reason that he was put out of the room to which he had been assigned by defendants in their hotel, and was refused proper accommodations in said hotel. The jury found for defendants, and the court, on motion of the plaintiff, set aside the verdict and granted a new trial. The grounds of the motion were: "1. Because the verdict was not supported by the evidence, as applied to the law as charged by the court. 2. Because the jury in rendition of the verdict, ignored the law as charged by the court. 3. Because the verdict is not supported by the evidence."

The well established rule in this court, as to granting new trials is, "that this court will not revise a judgment granting the motion, unless the evidence plainly and palpably supports the verdict."—*Merrill v. Brantley*, 133 Ala. 537, 31 South. 847; *Smith v. Tombigbee R. R. Co.*, 141 Ala. 332, 37 South. 389.

The theory of the plaintiff relied on for a recovery is clearly stated in the complaint, upon which, issue being taken, the case was tried. The plaintiff's evidence tended to support the complaint, but the evidence of the defendants was not entirely consonant therewith. In some of its more important phases, it conflicted, and different inferences might have been well drawn therefrom. It would be useless to review the evidence on each side, to do which would require time and labor. We have carefully read the evidence in consultation, and conclude that while it might justify, yet it does not "plainly and palpably support the verdict," without which condition, we cannot consistently with the

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rule of the court above announced reverse the judgment granting the motion for a new trial.

Under the averments of the complaint, the defendant was not liable, if he offered plaintiff proper accommodations in lieu of the room previously assigned to him.

The ruling on the motion for a new trial must be affirmed.

Affirmed.

TYSON, C. J., and SIMPSON and DENSON, JJ., concur.

### Fielder v. Tipton.

*Action for Damages for Personal Injury by Being Run Into by a Bicycle.*

(Decided Dec. 20th, 1906. 42 So. Rep. 985.)

*Municipal Corporation; Use of Sidewalks; Personal Injury.*—A person riding a bicycle on a sidewalk is responsible in damages to any pedestrian who is injured thereby, while in the proper exercise of his rights, although there is no ordinance prohibiting the riding of bicycles on the sidewalk, and a complaint which alleges that the plaintiff was injured by being run into by the defendant who was riding a bicycle on a sidewalk in the city is sufficient, without any other allegation of negligence.

APPEAL from Mobile Circuit Court.

Heard before Hon. SAMUEL B. BROWNE.

Action by Frankie Tipton against John W. Fielder. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

The third count is in the following language: Plaintiff claims of the defendant the further sum of \$1,000. for that heretofore, to-wit, the 25th day of April, 1903, said plaintiff avers while on the sidewalk on State street, at a point between Joachim and Conception street, and as a pedestrian on said sidewalk, the de-

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defendant, who was at said time and place riding a bicycle, did then and there run said bicycle upon and against the plaintiff thereby greatly injuring her, so that she became in consequence thereof sore, sick and unable to attend to her affairs. (Here follows a lot of special damages.) And plaintiff avers that the said sidewalk was in the city of Mobile, and defendant was riding his said bicycle thereon at the time when he ran into her. The demurrers are set out in the opinion. The charges of the court refused to the defendant not being discussed in the opinion are not here set out. There was judgment for plaintiff in the sum of \$45.00.

ROBERT E. GORDON, for appellant.—There is neither a state nor a municipal law making it unlawful to ride a bicycle upon the streets of Mobile at the point where the collision occurred. It is not unlawful under the common law to ride a bicycle on the streets or sidewalks.—*Lee v. City of Port Huron*, 55 L. R. A. 308; *Purple v. Greenfield*, 138 Mas. 381. The court erred in the part of the general charge excepted to.—*Lee v. City of Port Huron*, *supra*. The court erred in refusing to give charge 6.—*Matson v. Maupin*, 75 Ala. 312; *Harold v. Jones*, 86 Ala. 278. The court erred in refusing charge 10.—Beach on Contributory Negligence, p. 47; 1 Sherman and Redfield on Negligence, (4th Ed.) p. 16.

RICKABY & DUNLAP, and W. S. ANDERSON, for appellee.—A bicycle is a vehicle.—*Mercer v. Corbin*, 117 Ind. 450, 10 Am. St. Rep. 76; *Knouff v. Logansport*, 26 Ind. App. 202, 84 Am. St. Rep. 292; *Davis v. Petrino-vich*, 112 Ala. 654.

Sidewalks are for pedestrians only.—*Mercer v. Corbin*, *supra*; Note to *Riepe v. Elting*, 48 Am. St. Rep. at 377; Clementson's Road Rights and Liabilities of Wheelmen, p. 147; Elliott on Roads and Streets, (2nd Ed.) p. 927.

Riding on sidewalks is negligence per se.—Same cases last cited. As sidewalks are for pedestrians only,

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a city has no right, in the absence of delegated authority, to grant away the exclusive rights of pedestrians thereto.—*Perry v. N. O., M. & C. R. R. Co.*, 55 Ala. 421; *Jones v. Willamburg*, 49 L. R. A. 298; *Davis v. Petrinovich*, *supra*; *Castello v. State*, 108 Ala. 45.

The word "regulate" as used in the charter of the city of Mobile means to restrict rather than to enlarge—*U. S. v. Harris*, 26 Fed. Cas. at page 193.

Any ambiguity or doubt arising out of the terms used by the legislature must be resolved in favor of the public.—*City of Eufaula v. McNabb*, 67 Ala. 588; *Minturn v. Larue*, 64 U. S. (23 Howard) 435; Lewis' Southernland's Statutory Construction, Vol. 2nd, Sec. 551.

SIMPSON, J.—This was an action for damages on account of injuries claimed to have been received by the plaintiff (appellee) on a sidewalk in Mobile, from being run against by the defendant (appellant) while riding on a bicycle along said sidewalk. The assignments of error are to the rulings of the court on demurrers to counts of the complaint and to giving and refusing charges.

The third count of the complaint, as amended, avers that complainant was on the sidewalk as a pedestrian, and that the defendant, riding on a bicycle, ran the same on and against her, thereby causing the injury and that "defendant was riding his said bicycle thereon at the time when he ran into her." The demurrer to this count alleges as grounds: (1) That it does not allege any facts which would constitute negligence; (2) does not show that defendant was negligently riding his bicycle; (3) does not allege that the injury was due to the negligence of the defendant; (4) that it is not negligent per se to ride a bicycle on the sidewalk. The argument of appellant to show that the court erred in overruling the demurrer to the third count of the complaint as amended is that, as there was no ordinance of the city prohibiting persons from riding on the sidewalk in question, the defendant had the right to be there, and consequently that it was necessary to allege some other act of negligence than the mere riding of the bicycle on the sidewalk. The case of *Lee v. City of*



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*Port Huron*, (Mich.) 87 N. W. 637, 55 L. R. A. 309, was a case in which a bicycle rider sued for damages for injuries received on account of a defect in the sidewalk; and the court said that the riding of a bicycle on the sidewalk is not an unlawful act at common law, and that one riding on a sidewalk "with care, under authority of a municipal ordinance," may recover for injuries resulting from the want of repair of the sidewalk; but the court intimates that such want of repair must be such as would render it not reasonably suited for the uses for which sidewalks are constructed, to-wit, for pedestrians, and that he could not recover for any other, such as a crack between the planks of a plank sidewalk. The case of *Purple v. Greenfield*, 138 Mass. 1, 7, was one in which the plaintiff stepped back to avoid a boy riding on a velocipede, and fell into a cellar window hole, and the court say: "We cannot lay it down as a universal proposition that any and every use of any kind of velocipede upon the sidewalk is unlawful."

On the other hand, the authorities sustain the proposition that a bicycle is a "vehicle," and that its proper place is upon the highway, or the street proper, and not upon the sidewalk.—Elliott on Roads and Streets (2d Ed.) § 852, p. 927; Clementson on Road Rights and Liabilities of Wheelmen, §§ 99, 103, pp. 90, 94; *Davis v. Petrinovich*, 112 Ala. 654, 21 South. 344, 36 L. R. A. 615. It has also been held that, even without a statute, one who rides a bicycle at night without a light or other signal on a public thoroughfare is guilty of negligence.—*Cook v. Fogarty*, (Iowa) 72 N. W. 677, 39 L. R. A. 488. In a case wherein the Supreme Court of Indiana held that one who rudely and recklessly ran a bicycle against another, who was standing on the sidewalk, was guilty of an assault and battery, regardless of his intent, the court remarks that the bicycle is a vehicle, and its use on a public sidewalk is unlawful; also that "sidewalks are intended for the use of pedestrians, and not for the use of persons in vehicles. \* \* \* It would be a palpable contradiction to affirm that footmen have the exclusive right to the use of the sidewalks, and yet concede that persons, not traveling as pedestrians may

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also rightfully use them.—*Mercer v. Corbin*, 117 Ind. 450, 454, 20 N. E. 132, 3 L. R. A. 221, 10 Am. St. Rep. 76. In a case which was very maturely considered, and in which a number of authorities are cited, the Supreme Court of New Jersey has held that a person who was kicked by a horse which was being led along the sidewalk was entitled to recover, without regard to the fact as to whether the horse was known to be vicious, on the ground that the party defendant had no right to lead the horse along the sidewalks, and the cases therein cited sustain the proposition that it is not necessary to allege any special negligence, other than the mere fact of leading the horse on the sidewalk.—*Heuley v. Ballantine*, (N. J. Sup.) 49 Alt. 511, 512, 514. Messrs. Sherman & Redfield, in their work on Negligence (3d Ed. § 310), in referring to the case of a person traveling on the wrong side of a road, say: "He assumes the risk of all experiments in this direction, and is bound to use more care, and to keep a better lookout for approaching vehicles, than would otherwise be required of him; while those who pass him on their proper side of the road have a right to presume that no greater caution or skill will be required on their part than would be necessary if he were on his own side of the road. By an unnecessary deviation from his proper side of the road, he takes the risk of the consequences which may arise from his inability to get out of the way of another traveler approaching on the right side of the road."

In the light of these authorities, and in accordance with the reason of the law, we think it is clear that the pedestrian has a right to the uninterrupted use of the sidewalk, and is not required to exercise any more care in walking thereon than such as is necessary to avoid injuries from other pedestrians walking thereon; the question of the repair of the sidewalk not being involved. On the other hand, the person riding a bicycle has no right to the use of the sidewalk, and while it may be true that such use is tolerated by the failure to affix a penalty thereto, yet, when a person rides a bicycle on a sidewalk, he is invading the part of the street set apart for the use of pedestrians, and takes upon him-

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self the risk of injuring them, so as to be responsible to any pedestrian who is injured, while in the proper exercise of his rights in coming upon or waking along the sidewalk. Consequently the allegations of the third count of the complaint as amended were sufficient, and the court committed no error in overruling the demurrer.

Without entering into the question as to whether the city has the right to allow bicycles to be ridden on the sidewalks, the ordinance introduced in evidence does not definitely authorize the riding of a bicycle on any sidewalk, except between the hours of 12 o'clock midnight and 7 a. m. The defendant himself testified that he was traveling at the rate of 4 or 4 1-2 miles per hour; that "he was familiar with the oyster shop from which plaintiff stepped, and knew that persons were constantly going in and out, as he passed along there four times every day"; also, that it was impossible for him to turn in time to have avoided striking her, after he saw her. Under the rules above laid down, the court would have been justified in giving the general charge in favor of the plaintiff. Hence the defendant was not injured by any charge given by the court.

The judgment of the court is affirmed.

TYSON, C. J., and HARALSON and DENSON, JJ., concur.

## **Crowley v. City of West End et al.**

### *Action for Damages for Personal Injury.*

(Decided March 2, 1907. 43 So. Rep. 359.)

**Municipal Corporations; Negligence; Personal Injury;; Proximate Cause; Complaint.**—A complaint is insufficient which alleges that defendant negligently permitted a large body of water to collect in a highway; that plaintiff's horse fell in the water and that to save him plaintiff was compelled to

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get out into the water to unhitch the horse so as to enable him to get up, and that while doing so the horse knocked plaintiff down into the water; that on arising plaintiff was compelled to remain standing in the water to re-hitch the horse, and as a result thereof he caught a severe cold, as such complaint shows that the defendant's negligence was not the proximate cause of the injury, and that the injury resulted from a subsequent intervening cause.

APPEAL from Birmingham City Court.

Heard before Hon. CHARLES FERGUSON.

Action by E. Lee Crowley against the city of West End and others. Judgment for defendants, and plaintiff appeals. Affirmed.

The original complaint contained two counts, to which demurrers were interposed and sustained, whereupon he filed an amended complaint containing counts 3 and 4. It will suffice for this case to set out one of these counts, as they are all very similar: "Count 3. The plaintiff, E. Lee Crowley, claims of the defendant the sum of \$1,500 damages, for this: That the defendants heretofore, to-wit, on and prior to the 16th day of January, 1905, unlawfully and negligently created, caused, maintained, permitted, or suffered a public nuisance in Jefferson county, Alabama, at the town or city of West End, and in or on and about what is known as Tuscaloosa avenue, at or near the junction of what is known and called as Walnut street with said avenue, in that the defendant negligently caused, suffered, created, or permitted a large pond of water to collect and stand or remain in, along, and across Tuscaloosa avenue, in that certain natural swag or low place of ground on or in and about said avenue at said place, which said water plaintiff avers from freeing caused an accumulation of ice to be in or upon said pond of water on said date, so that, while the plaintiff was exercising due care in traveling along said Tuscaloosa avenue, on his way from the city of Birmingham to his home in the town of Brighton, in said county and state, in a vehicle or delivery wagon drawn by a horse delivering goods, wares, and merchandise to his customers living along said way, the horse, in passing

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along said avenue and wading through said pond, came in contact with the ice, or the ice and water, so that he fell in the ice and water in such a manner as that the plaintiff, in order to get the horse up and save him, was compelled to get out into the ice and water and unhitch the horse so he could get up, and while he was doing so the horse, in his efforts to arise, shoved or knocked the plaintiff down into the ice and water, and fell on or against him, so that he was covered with water, or ice and water, and that when he (plaintiff) got up onto his feet he was compelled to remain standing in said pond to rehitch the horse to the vehicle before he could get out of the pond with the vehicle and horse." It is further averred that he was injured and suffered great inconvenience and other damages, had to shiver with cold, his left knee and right hip were greatly strained and made sore, that he had to borrow clothes from a negro because the weather was freezing; that he was greatly humiliated by having to go into the presence of other people in that plight; that he took cold and had to stay indoors several days; and that his business suffered accordingly. It is also alleged that the avenue is a public street or roadway for public travel, and the main thoroughfare at or about the place of the pond. It is further averred that he filed his claim with the mayor and aldermen, asking for its allowance, and that it was refused. Demurrers were interposed: "(1) Because there was misjoinder of parties defendant. (2) Because each count shows that the alleged injuries were not the proximate consequence of any conduct on the part of these defendants. (3) Because it shows affirmatively that the alleged injuries were the proximate consequence of the plaintiff's own negligence, and not the result of anything done by any one of these defendants, and because it is not shown that the claim was itemized or verified as required by law, and because the true nature and character of the claim is not set forth." These demurrers were sustained, and, the plaintiff declining to plead further, a judgment was rendered for defendants.

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ESTES, JONES & WELCH, for appellant.—A person has the right to go upon the street in the ordinary way using ordinary care either by day or night with knowledge of the dangerous condition of the street and if he acts with reasonable precaution or prudence in doing so and was injured he is entitled to recover.—15 Am. Neg. Rep. 24; *City of Muncy v. Hey*, 18 Am. Neg. Rep. 53. An individual creating a nuisance in the city as well as the city authorizing or permitting it is liable and may be jointly held.—14 Am. Neg. Rep. 112. The acts of plaintiff in attempting to save his horse did not constitute contributory negligence or an intervening subsequent cause:—*Birmingham Ry., L. & P. Co. v. Hinton*, 141 Ala. 606; s. c. 40 South. 998; *Liming v. Ill. Cent. Ry. Co.*, 45 A. & E. R. R. Cases, 582; *Stickney v. Town of Maidstone*, 30 Vt. 738. It was the duty of plaintiff to have attempted to save his horse in order to render the damages to defendant as little as possible:—*G. P. R. R. Co. v. Fullerton*, 79 Ala. 302; 84 Ala. 183.

JOHN H. MILLER, and C. D. POWELL, for appellee.—Unless the tort be the proximate cause of the injury complained of there is no legal accountability.—*Milwaukee R. R. Co. v. Kellog*, 94 U. S. 469; 16 A. & E. Ency. of Law, 436; Wharton's Neg. § 75; Sherman & Redfield's Neg. § 739. The entire question of proximate cause and intervening independent agencies is thoroughly discussed in the following cases: *W. Ry. of Ala. v. Mutch*, 97 Ala. 194; *Decatur C. W. & M. Co. v. Mahaffey*, 128 Ala. 242; *Thompson v. L. & N. R. R. Co.*, 91 Ala. 500.

ANDERSON, J.—“To constitute actionable negligence, there must be not only causal connection between the negligence complained of and the injury suffered, but the injury suffered must be by a natural and unbroken sequence—without intervening efficient cause—so that, but for the negligence of the defendant, the injury would not have occurred. It must not only be a cause, but it must be the proximate—that is, the direct and immediate, efficient—cause of the injury.”—*West-*

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*orn R. R. v. Match*, 97 Ala. 194, 11 South. 894, 21 L. R. A. 316, 38 Am. St. Rep. 179; *M. & O. R. R. v. Christian Co.*, 146 Ala. 404, 41 South. 17; *Decatur Car Co. v. Mahaffey*, 128 Ala. 242, 29 South. 646; Cooley on Torts, § 69, Sherman & Red. on Neg. § 26; Wharton on Neg. 26. Each count of the complaint charges negligence to the defendant for permitting an accumulation of water in the road, while the injury sustained is averred to have been caused by the action of the horse while plaintiff was assisting him to get up, and which occurred after plaintiff had safely alighted from the wagon, and was the result of a subsequent independent act of the plaintiff. The cases relied upon by the plaintiff (*Birmingham R. R. v. Hinton*, reported in 141 Ala. 606, 37 South. 635, and again in 40 South. 988, and *Liming v. Ill. Cen. R. R.*, 47 N. W. 66, 81 Iowa, 246), do not benefit his complaint. In each of said cases the injuries sustained were burns from fires negligently started by defendants. Here the injury to the plaintiff was not the proximate cause of the defendant's alleged negligence, but was the result of a subsequent intervening cause.

The trial court properly sustained the demurrers to the complaint, and the judgment is affirmed.

Affirmed.

TYSON, C. J., and DOWDELL and MCCLELLAN, JJ.,  
concur.

## Western Union Telegraph Company v. Prevatt.

*Damages for Failure to Deliver Telegram.*

(Decided Feb. 14th, 1907. 48 So. Rep. 106.)

1. *Telegraphs and Telephones; Operation; Messages; Relationship; Damages; Mental Suffering.*—A grandson is within that near relationship that will authorize a recovery for mental pain

- and anguish occasioned by the failure to deliver a message stating that the grand father was dying and to come at once.
2. *Same; Agent of Sender; Stipulation as to Claim for Damages.*—The sender, who could neither read nor write, went into the telegraph office and procured one of the employes to write a telegram for him and sign his name thereto. The message was written on the usual blank form and was read back to the sender. Held, the employe was the agent of the sender in writing the message so as to bind him to a stipulation on the form requiring the filing of his claim for damages within a certain time.
3. *Same; Limiting Liability.*—In the absence of fraud, one who procures another to write a message upon one of the forms for that purpose and sign his name thereto without dissent, is estopped to deny the binding force of a notice on such form limiting the company to liability for damages to claims presented within thirty days after the message is filed for transmission.
4. *Same.*—Although the sender, who was the agent of the plaintiff sendee, could not read and write, and procured another to do so for him, the plaintiff sendee, in the absence of fraud is bound by the stipulation limiting liability to damages on claims filed within thirty days from the day the message was filed for transmission.

APPEAL from Houston Circuit Court.

Heard before Hon. H. A. PEARCE.

Action by J. D. Prevatt against the Western Union Telegraph Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

RUSHTON & COLEMAN, and A. H. ARRINGTON, for appellant.—The relationship of grandson and grandfather is not within the degree for which there can be a recovery for mental pain, nor does proof of such relationship of itself raise a presumption of law that mental pain and anguish was suffered.—*W. U. Tel. Co. v. Ayers*, 131 Ala. 391; *W. U. Tel. Co. v. Crocker*, 135 Ala. 492; *W. U. Tel. Co. v. Wilson*, 75 S. W. 482; *W. U. Tel. Co. v. Steinburger*, 54 S. W. 829; *W. U. Tel. Co. v. Luck*, 41 S. W. 469; *W. U. Tel. Co. v. Coffin*, 30 S. W. 298; *W. U. Tel. Co. v. McMillan*, 30 S. W. Rep. 298; *W. U. Tel. Co. v. Garrett*, 34 S. W. 649; *W. U. Tel. Co. v. Gibson*, 39 S. W. Rep. 198; *W. U. Tel. Co. v. Brown*, 2 L. R. A. 766; *W. U. Tel. Co. v. Davidson*, 54 S. W. Rep. 853.



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Plaintiff's agent bound the plaintiff by the stipulations on the telegraph blank on which the message was written that claim for damages must be presented to the company within a specified time.—*Harris v. W. U. T. Co.*, 121 Ala. 523; *W. U. T. Co. v. Edsall*, 63 Tex. 688; *W. U. T. Co. v. Foster*, 64 Tex. 664; *Tex. Tel. & T. Co. v. Seiders*, 29 S. W. Rep. 258; *G. C. & S. F. Ry. v. Geer*, 24 S. W. Rep. 86; *Givan v. W. U. T. Co.*, 24 Fed. Rep. 119; *Stamey v. W. U. T. Co.*, 18 S. E. Rep. 1008; *Carroll v. Express Co.*, 16 S. E. Rep. 128; *Ayers v. W. U. T. Co.*, 72 N. Y. Supp. 634; *W. U. T. Co. v. Simms*, 69 S. W. 464; *So. Ex. Co. v. Newby*, 36 Go. 635; *W. U. T. Co. v. Buchanan*, 35 Ind. 439; *Clements v. W. U. T. Co.*, 137 Mass. 463.

Charge number nine was improperly refused.—*Edmondson v. Anniston C. L. Co.*, 128 Ala. 594; *Barnard v. State*, 88 Ala. 113; *Smith v. State*, 86 Ala. 30; *Miller v. State*, 54 Ala. 155; *Eiland v. State*, 52 Ala. 322; *Bell v. Troy*, 35 Ala. 184.

ESPY & FARMER, for appellee.—The case of *W. U. Tel. Co. v. Crocker*, 135 Ala. 492, is conclusive on the question of relationship which will support recovery for mental anguish. See also the case of *Kirchbaum v. W. U. Tel. Co.*, 41 South. 16. If we take the version of appellee's agent as to the transaction of sending the telegram appellant's agent did not become plaintiff's agent so as to bind him by the stipulations as to the time when claims for damages must be preferred.—*Harris v. Western U. Tel. Co.*, 121 Ala. 519. On the same authority the court properly refused charge 9.

HARALSON, J.—1. The defendant, appellant here, insists upon error on three grounds, which really cover all the points involved in the appeal. The first of these, as stated by defendant's counsel, "Is the relationship of grandson and grandfather, within the degree for which there can be a recovery for mental pain and anguish, occasioned by failure to deliver a telegram, and does proof of such relationship raise a presumption of law that mental pain and anguish were suffered?"

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This question was considered very fully in the recent case of the *Western Union Tel. Co. v. Crocker*, 135 Ala. 492, 33 South. 45, 59 L. R. A. 398, and decided in the affirmative. We see no reason for departing from that decision. The case of *Western Union Tel. Co. v. Ayers*, 131 Ala. 391, 31 South. 78, 90 Am. St. Rep. 92, is not opposed, in any respect, to the *Crocker Case*. The *Ayers Case* was an action by a father against the telegraph company, for the negligent failure to deliver a message sent by the father of a sick child, summoning his brother-in-law, to the child's bedside, which message the sendee, the uncle of the child, did not receive till too late to reach the child before its death. The father sought damages for his mental anguish and suffering on account of the absence of his brother-in-law, and it was held that the relationship between the sender and sendee was too remote to authorize damages in favor of the former.

2. It is insisted, that Mrs. Cason, a clerk in the office of the telegraph company at Dothan, became, on account of what occurred between her and B. L. Prevatt, the agent of the latter in and about the sending of the message, so as to bind him, B. L. Prevatt, to a stipulation on the back of the telegraph blank on which the message was written, that claim for damages must be presented within a specified time.

The evidence of B. L. Prevatt was, that the grandfather of the plaintiff was sick in Dothan, in the early part of November, 1903, when plaintiff decided to leave that town, to go to Enterprise; that on leaving he requested his brother, B. L. Prevatt of Dothan, to telegraph to him at Enterprise, in the event his grandfather should get worse, and that said B. L. Prevatt agreed to do so; that on November 3rd, the witness went to the telegraph office, and told the lady clerk, who was Mrs. Cason, that he wished to send a message to his brother, J. D. Prevatt, at Enterprise, telling him that his grandfather was not expected to live and to come home.

He further testified that he was the agent for his brother, J. D. Prevatt, for this purpose, could neither read nor write, and requested Mrs. Cason to send the

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message for him, for which he paid her 25 cents; that he dictated the message, and the clerk wrote it down, and after she had written it, she read it back to him, and thereupon, after paying the charge, he left the office.

The message was as follows:

"Dothan, Alabama, 11-3-'06.

"Rev. J. D. Prevatt, Enterprise, Ala.

"Your father is not expected to live. Come at once.

"B. L. Prevatt."

It was further shown that on the back of the telegram were a number of conditions, and among them, that "the company will not be liable for damages or statutory penalties in any case, where the claim is not presented in writing within thirty days after the message is filed with the company for transmission." He further testified that he did not see defendant's clerk write the message on the telegraph blank; that he could not say that she did or did not write it, and that he did not know that she did any writing while he was in the office; that he had neither notice of the rule of the company in respect to presenting claims for damages, nor of the stipulation on the back of the printed form, about which he knew nothing, as he did not see the form, nor was he told what was on its back.

Mrs. Cason testified for defendant, "that she was at the time, clerk in the telegraph office at Dothan; that about 10 o'clock p. m., B. L. Prevatt came into the office and said he desired to send a telegram to his brother at Enterprise; that he could neither read or write, and that he wanted witness to write and send the message for him; that she wrote the message on a blank provided for the purpose by the telegraph company; that he dictated the message to her as she wrote it on the blank and that after she wrote it, she read it back to him; that thereupon he paid the charge, 25 cents, for the transmission and left the office; that the message was written on a blank of the company; \* \* \* that on the back of the blank, upon which the message was written was the printed rule of the company," as set out above.

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It was shown that plaintiff presented no claim to the telegraph company, in writing, within thirty days after the message was filed with the company, nor was any claim filed until this suit was brought.

That Mrs. Cason in writing the message notwithstanding she was the agent of the company, was acting for and on behalf of the sender, cannot well be denied. In the preparation of the message, she was acting as the agent of the sender. While she was the agent of the company to receive and forward messages, she was not such agent to write messages for others. When specially requested by the plaintiff to do this work for him, she was as much his agent, as if he had been a stranger to her. When one writes a message upon one of these blanks, or procures another as his agent to write it for him, and signs the same, or procures his agent to sign his name to it, without dissent, he will, in the absence of fraud be estopped from denying the binding force of such regulations on the message as to which we have referred, notwithstanding he did not read them. He will not be permitted to show that he did not read or understand the conditions contained in the printed regulations.—*Western Union Tel. Co. v. Edsall*, 63 Tex. 668, citing *Gray's Communications by Telegraph*, 52, note 2; *White v. Western Union Tel. Co.*; 14 Fed. 720, 722, notes "n" and "v."

There was no conflict in the evidence as to the agency of Mrs. Cason for the sender in writing the message. The question whether the rule was reasonable is not raised in this case, since issue was taken on defendant's pleas, which involved the rule as a defense.

The fact that the plaintiff's agent could neither read nor write, is of no consequence in this case. If one who cannot read or write, executes an instrument, without asking to have it read to him, the legal effect of his signature, or execution of the instrument, cannot be avoided by showing his ignorance of its contents, in the absence of some fraud, deceit, or misrepresentation having been practiced upon him.—*Burroughs v. Pacific Guano Co.*, 81 Ala. 258, 1 South. 212; *Goetter, Weil & Co. v. Pickett*, 61 Ala. 387; *Campbell v. Larmore*, 84

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Ala. 500, 4 South. 593; *Bank v. Webb*, 108 Ala. 137, 19 South. 14.

The evidence is clear and undisputed that no deceit, fraud or misrepresentation was practiced on the plaintiff by the clerk, Mrs. Cason, who wrote the message for him as his agent.

Under the undisputed evidence, the general charge as requested by the defendant should have been given. It is unnecessary to notice other assignments of error.

Reversed and remanded.

TYSON, C. J., and SIMPSON and DENSON, JJ., concur.

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### *Damages for Failure to Transmit Message.*

(Decided Feb. 14th, 1907. 43 So. Rep. 117.)

1. *Pleadings; Stating Conclusions.*—A replication stating merely that defendant waived a provision of the contract, without stating facts showing such waiver, is bad as stating a conclusion.
2. *Same; Aided by Pleadings not in the Record.*—Reliance can not be had upon pleadings to which demurrer has been sustained, and which was, therefore, out of record, to sustain other pleading that refers for its facts to the pleading out of the record.
3. *Appeal; Presumptions; Overruling Demurrer.*—It cannot be presumed that pleading would have been amended had demurrer been sustained thereto, hence it is not harmless error to overrule a demurrer which states that the pleading merely states a conclusion.
4. *Telegraphs; Acceptance of Message for Transmission; Conditions; Waiver.*—The Company may waive the condition in the contract under which it sends a message that it will not be liable for damages growing up out of a failure on its part unless the claim is presented within sixty days after the filing of the message for transmission.
5. *Same.*—The waiver of the conditions that the company will not be liable for damages growing up out of its failure to trans-

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- mit a message unless the claim is presented in writing within sixty days, may rest in parol.
6. *Principal and Agent; Power of Agent; Undisclosed Limitation on.*—A waiver by the head man and general manager of its local office of the conditions in the contract that the company will not be liable unless a written claim for damages is presented within sixty days, is binding on the company, in the absence of knowledge on the part of the person having the claim of a limitation upon the authority of such officer or agent imposed by the company.
  7. *Telegraphs; Failure to Deliver Message; Actions; Parties.*—Unless the person delivering the message for transmission acts for or on behalf of the person to whom it is addressed, such person is not a party to the contract for transmission and delivery of the message so as to be entitled to maintain an action for its breach.
  8. *Evidence; Conclusion of Witness.*—The sender of a telegram may not testify that he delivered it to the company for the benefit of the addressee, it being a conclusion.
  9. *Same.*—It is not a conclusion, and therefore not objectionable, whether one, if a telegram had been delivered at a certain time, could have reached a certain place by a fixed time.
  10. *Principal and Agent; Evidence of Agency; Testimony of Agent.*—One sending a telegram cannot prove by his testimony showing that he delivered the message for the benefit of the addressee, that he acted as agent of the addressee.
  11. *Telegraphs; Failure to Deliver Message; Damages; Mental Suffering.*—The relation of brother and sister is such as to authorize recovery for mental suffering for failure to deliver telegram.
  12. *Principal and Agent; Evidence of Agency.*—For the purpose of showing the authority of F. to present plaintiff's claim to defendant for damages, it is competent to show that plaintiff placed her claim in the hands of F. for collection, and that F. orally presented the claim.

APPEAL from Jefferson Circuit Court.

Heard before Hon. A. A. COLEMAN.

Action by Movie Heathcott against the Western Union Telegraph Company. Judgment for plaintiff. Defendant appeals. Reversed and remanded.

The plaintiff filed replications 3 and 4; but, as demurrer was sustained to replication 3, and it is not shown to have been amended, it is not necessary to here set it out. Replication 4 was as follows: "Plaintiff,

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for replication to the third plea of defendant, sets down and assigns the following: The defendant, by and through its agents, waived the terms alleged to be on the back of the message blank requiring plaintiff to present her claim in writing within 60 days after said message was filed with defendant for transmission, as in described in said plea." To this replication several grounds of demurrer were interposed, one of which is as follows: "The replication alleges that the regulation or term set up in the third plea was waived, and does not allege or show facts to establish a waiver, and the averment of the replication as to waiver is the conclusion of the pleader." The telegram alleged to have been sent and not delivered was of date June 28, 1904. The first written presentation of demand for payment was on September 9, 1904. It was shown, however, by a witness for the plaintiff, that he spoke to Mr. Williams concerning this claim within 30 days after the sending of the message, and that Mr. Williams stated to him that he would take the matter up for investigation, and, if he found the facts to be as stated, would try and make a settlement of the same—would make him the very best proposition he could. Witness, who was the attorney of plaintiff, stated that he saw Williams several times after this, and before writing the letter above referred to, and that he asked him about this claim, and that Williams replied that he was investigating it with a view to settling the claim, but that he needed more time for investigation. All this, however, was denied by Williams. The other facts and objections to testimony sufficiently appear from the opinion.

The defendant requested the following charges, which the court refused: (1) General affirmative charge. (2) Affirmative charge as to count 1. (3) "I charge you that under the evidence in this case you cannot find that the rule or regulation set up in the third plea of the defendant was waived by the defendant." (4) "The court charges the jury that conversations had with Williams within 60 days were not in compliance with the rules set up in the third plea, and not a sufficient an-

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swer thereto." (5) "The court charges the jury there is no evidence in this case that Williams had authority to waive said rule requiring a claim in writing to be filed with the company within 60 days as set up in defendant's said plea." (6) "I charge you that, although you may believe from the evidence that Mr. Fort, representing the plaintiff, and defendant's manager, Williams, had some conversation in reference to the failure to deliver the message sued on prior to the presentation of the claim in writing on September 9th, yet such conversation was not a waiver of the rule or regulation set up in defendant's third plea."

There was judgment for the plaintiff in the sum of \$1,500.

GEORGE H. FEARRONS, and CAMPBELL & WALKER, for appellant.—Demurrers should have been sustained to the 4th replication.—Sec. 2301, Code 1896; *L. & N. R. Co. v. Mothershed*, 110 Ala. 156; *Reid v. Nash*, 23 Ala. 738; *Mabry v. Herndon*, 8 Ala. 863; *McKeagg v. Callahan*, 13 Ala. 823; *Insurance Co. v. Parkes*, 39 South. 204; *Manasses v. Henley*, 96 Ala. 454; *M. & O. R. Co. v. Sears*, 13 South. 917; 18 Enc. P. & P. 663. The objection to question to Jones should have been sustained.—*Telegraph Co. v. Adair*, 115 Ala. 441. Objection should have been sustained to the question as to whether or not plaintiff would have been able to come to Birmingham to have seen her brother had she received the telegram.—*Telegram Co. v. Merrill*, 39 South. 121. Plaintiff should not have been permitted to testify that she suffered mental pain and anguish.—*Western U. Tel. Co. v. Haley*, 39 South. 386; *W. U. Tel. Co. v. Merrill*, *supra*. The facts do not show a waiver on the part of defendant of the condition requiring the claim to be put in writing and submitted to the company within a given time.—*Harris v. Telegraph Co.*, 121 Ala. 521; *W. U. Tel. Co. v. Dougherty*, 26 Am. St. Rep. 33; *Tel. Co. v. Yopst*, 11 N. E. 16; 27 A. & E. Ency. of Law, p. 1049 and cases cited. Defendant should have been granted a new trial.



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WILLIAM E. FORT, for appellee.—There was no formal adjudication as to the demurrer to the replication to plea 4.—*Carter v. Long*, 125 Ala. 280; *Williams v. Coosa Co.*, 138 Ala. 673; *Crawford v. Crawford*, 119 Ala. 34; *Jasper Merc. Co. v. O'Rear*, 112 Ala. 247; *McDonald v. Ry. Co.*, 26 South. 165. In any event the demurrers were general.—*Cowan v. Motley*, 125 Ala. 369; *Moore v. Heineke*, 119 Ala. 634. The defendant had the benefit of all the evidence that could have been introduced under the replication and plea and the court's action was harmless.—*Payne v. Crawford*, 102 Ala. 297 and cases cited. The court did not err in its admission of Jones' testimony. At most it was irrelevant and the judgment was supported by the other evidence.—*Blackwell v. Hamilton*, 47 Ala. 470; *Dowling v. Blackman*, 70 Ala. 303. In any event the question called for a shorthand rendering of facts and not conclusions.—*Railroad Co. v. McLendon*, 63 Ala. 266. Plaintiff was properly permitted to state that had she received the telegram she could and would have come to Birmingham to see her brother before his death.—*Bright v. W. U. Tel. Co.*, 132 N. C. 326. The evidence was sufficient to establish a waiver of the conditions as to the presentation of the claim in writing within a given time.—*W. U. Tel. Co. v. Cunningham*, 14 South. 580; *W. U. Tel. Co. v. Crumpton*, 36 South. 519; *Wheeler v. McGuire*, 86 Ala. 398; *Coffin Co. v. Stokes*, 78 Ala. 372; *W. U. Tel. Co. v. Way*, 83 Ala. 542; *Brigham v. Carlyle*, 78 Ala. 243; *Andrews v. Tucker*, 127 Ala. 603; *U. S. L. Ins. Co. v. Lesser*, 126 Ala. 568; *Ga. Home Ins. Co. v. Allen*, 128 Ala. 451; *Tabor v. Royal Ins. Co.*, 124 Ala. 681. The following authorities in other states cover the precise points raised by appellant as to whether or not an oral presentation of a claim within the sixty days is a waiver of the conditions requiring a written claim to be filed.—*Hayes v. W. U. Tel. Co.*, 48 S. E. 608; *Hill v. Tel. Co.*, 85 Ga. 425; *W. U. Tel. Co. v. Stratemeier*, 32 N. E. 871; *Copeland v. Ins. Co.*, 43 S. C. 26; *Ill. Cent. Ry. Co. v. Bogard*, 27 South. 879; *Wabash Ry. v. Brown*, 39 N. E. 273.

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DENSON, J.—The complaint contained two counts, but the court charged affirmatively in favor of defendant in respect to the second count. The first count is *ex contractu*, and claims damages for the breach of a contract to deliver a message, which, it is alleged, was given to the defendant in Birmingham, Ala., to be transmitted by electricity to Chattanooga, Tenn., and there to be delivered to the plaintiff.

The general issue was pleaded, and also a special plea numbered 3. The special plea sets up in defense of the action a clause or condition in the contract in these words: "The company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within 60 days after the message is filed with the company for transmission." It is averred in the plea that no claim for damages was presented in writing within 60 days after said message was filed for transmission. The validity of such a stipulation in contracts of the kind declared on is no longer open to question in this jurisdiction.—*Harris v. Western Union Tel. Co.*, 121 Ala. 519, 25 South. 910, 77 Am. St. Rep. 70. See, also, *Hill v. Western Union Tel. Co.*, 85 Ga. 425, 11 S. E. 874, 21 Am. St. Rep. 166, where the cases are collected.

The plaintiff's demurrer to plea 3 having been overruled, she filed two special replications to the plea, numbered 3 and 4. A demurrer was sustained to No. 3 and overruled to No. 4. It will be observed that replication 4 merely states that the defendant, through its agents, waived the terms of the contract requiring the plaintiff to present her claim in writing within 60 days. Manifestly this is no more than a bare conclusion of the pleader. Pleas and replications, to be safe from demurrer, should contain a succinct statement of the facts relied upon as a defense or answer to a defense. The facts, then, relied on by the plaintiff as constituting a waiver, should have been succinctly stated in replication 4, so that the court could have determined whether or not they constituted a waiver. Ground C of the demurrer points out the defect. The demurrer to the replication should have been sustained.—1 Chitty on Pleading (1855) \*603; *Torbert v. Wilson*, 1 Stew.

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& P. 200; *Owen v. Handerson*, 7 Ala. 641; *Phoenix Insurance Co. v. Moog*, 7 Ala. 301, 56 Am. Rep. 31; *T. C., & R. R. Co. v. Herndon*, 100 Ala. 451, 14 South. 287; *Mabry v. Herndon*, 8 Ala. 863; *Hardy v. Branch Bank of Montgomery*, 15 Ala. 722; *Phinney v. Insurance Co.*, (C. C.) 67 Fed. 493; 18 Ency. of Pl. & Pr. 663.

But the plaintiff (appellee) insists that, if the court erred in overruling the demurrer to the replication, the error worked no injury to the defendant, because, first, she says that the facts proved under replication 4 were the same as those set out in replication 3, and therefore the defendant had notice of the facts that plaintiff intended to rely on. A demurrer having been sustained to replication 3, it was out of the record, and the defendant was not required to look to it for any purpose. Next it is insisted that the defendant was permitted to meet, and did meet, the facts proven under replication 4 by testimony in denial thereof, and therefore that the defendant cannot, upon appeal, complain of the imperfectness of the replication. The answer to this insistence is that, had the demurrer been sustained to the fourth replication, the plaintiff could not have offered evidence of the waiver at all without first amending the replication, and we cannot indulge the presumption that she would have amended it. The cases cited in support of the insistence, and which apply the doctrine of error without injury, where a demurrer to a special plea has been sustained, and the defendant either had or could have had, under the general issue benefit of the matter set up in the special plea, are not applicable. The facts of the case of *Payne v. Crawford*, 102 Ala. 387, 14 South. 854, prevent it from being authority for plaintiff's insistence. In that case there were many special replications to the defendant's special plea. Demurrers to the replications were overruled. The court held that the fourth replication set up a good reply, that the reply made by the sixth and tenth replications was not good, but the demurrer to them, being general, was properly overruled; also that the evidence offered was competent and properly admitted under the fourth replication, and therefore no injury resulted to defendant by the demurrer being overruled. The error in over-

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ruling the demurrer to the fourth replication must work a reversal of the judgment of the circuit court.

There are many other assignments of error, and as the cause must go back for another trial we shall notice those which seem to be important. While the defendant was entitled to have the claim for damages presented in writing within 60 days after the message was delivered for transmission, we think there is no doubt that the right is a limitation for the benefit of the defendant, is of its own creation, and may be waived by it, and the waiver may rest in parol.—27 Am. & Eng. Ency. Law (2d Ed.) p. 1049; *Hill v. Western Union Tel. Co.*, 85 Ga. 425, 11 S. E. 874, 21 Am. St. Rep. 166; 1 Elliott on Ev. § 596. It may be that an oral promise of a general agent or a manager of a telegraph company to look into the claim is not a waiver of the condition requiring the claim to be in writing. This point, however, we do not decide.—*Massengale v. Western Union Tel. Co.*, 17 Mo. App. 257; *Albers v. Western Union*, 66 N. W. 1040, 98 Iowa, 51; *Western Union v. Yopst*, (Ind.) 11 N. E. 16. In the case at bar we think the evidence offered by the plaintiff on the subject of a waiver goes further than a mere promise to look into the matter, and makes the question of waiver vel non one to be determined by the jury.

Another insistence of the appellant is that the agent at Birmingham (Williams), to whom it is claimed by plaintiff the oral claim for damages was presented, had no authority to waive presentation of the claim in writing. Williams testified he had no authority to waive any of the rules or regulations on the back of the blanks, and that he had no authority to change any of the rules of the company. But he also testified that he was at the time general manager of defendant's local office at Birmingham, and head man there, and in charge of the company's business there. Notwithstanding the testimony of the agent that he was without authority, he was a general agent. It was his duty to transact generally the telegraphic business at Birmingham. There is no evidence tending to show that plaintiff, or her agent who was representing her, knew of any limitation imposed by the defendant upon the au-

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thority of Williams. If the jury should find from the evidence there was a waiver of the claim, the defendant would be bound by his acts in this respect.—*Western Union Tel. Co. v. Cunningham*, 99 Ala. 314, 14 South. 579; *Syndicate Insurance Co. v. Catchings*, 104 Ala. 176, 16 South. 46; *Western Union Tel. Co. v. Blanchard*, 68 Ga. 299, 45 Am. Rep. 480; *Hill v. Western Union*, 85 Ga. 425, 11 S. E. 874, 21 Am. St. Rep. 166; 27 Am. & Eng. Ency. Law (2d Ed.) 1048, and cases collected in note 13. From these considerations, it follows that the written instructions refused to the defendant were properly refused.

The plaintiff is the sendee of the message, and it is averred in the complaint that the sender, in sending it, acted as the agent of and for the benefit of the plaintiff. Thus by the averments the plaintiff is made a party to the contract. Without this relationship of party to the contract, the action could not be sustained by the plaintiff for the breach of it.—*Western Union Tel. Co. v. Adair*, 115 Ala. 441, 22 South. 73; *Manker v. Western Union*, 137 Ala. 292, 34 South. 839. It was important, then, that the plaintiff should show the relationship. Manifestly for the purpose of showing the relationship referred to, counsel for the plaintiff asked her witness, C. B. Jones, the sender of the telegram, this question: "Did you deliver this message for the benefit of Movie Heathcoat?" Clearly this question called for the conclusion of the witness, and the objection to it should have been sustained.—*Minniece v. Jeter*, 65 Ala. 222. Furthermore, the fact as to whether the witness acted as agent for the plaintiff in sending the message cannot be proved in this way.

The question propounded to the plaintiff, "If you had received such a telegram between the 28th day of June and the 13th day of July, 1904, would you have been able to come to Birmingham to see your brother, and could you have come?" calls for testimony that is relevant and material. It does not call for a conclusion of the witness, but a shorthand rendering of facts. Nor does the question call for "a mental operation." So it was not subject to any ground of the objection made to it.

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In this action, on proper proof, damages for mental pain and suffering are recoverable.—*Western Union v. Ayers*, 131 Ala. 391, 31 South. 78, 90 Am. St. Rep. 92; *Western Union v. Haley*, 143 Ala. 586, 39 South. 386; *Western Union v. Merrill*, 144 Ala. 618, 39 South. 121. It was competent for the plaintiff to testify that she suffered mental pain and anguish. At least, the objections to the question calling for such evidence are not tenable.—*Eckles v. Bates*, 26 Ala. 655; *Birmingham Ry. Co. v. Hale*, 90 Ala. 8, 8 South. 142, 24 Am. St. Rep. 748.

It was necessary to show Fort's authority to represent plaintiff in presenting the claim for damages. Therefore the court committed no error in allowing plaintiff to prove that she placed her claim for damages with an attorney, Mr. Fort. Fort subsequently testified that he made an oral presentation of the claim.

The remaining assignments of error which relate to rulings of the court on the admissibility of evidence are disposed of and shown to be untenable by what we have said in respect of the question of waiver.

It is unnecessary to consider the assignment of error with respect to the refusal of the court to grant a new trial. For the errors pointed out, the judgment of the circuit court is reversed, and the cause is remanded.

Reversed and remanded.

TYSON, C. J., and HARALSON and SIMPSON, JJ., concur.

## Foster v. The State, ex rel. Stanford et al.

*Quo Warranto.*

(Decided March 2nd, 1907. 43 So. Rep. 179.)

*Judges; Appointment; Election.*—A judge of probate was appointed by the Governor to fill a vacancy occurring by death of incumbent on May 6th, 1906. Held, that under the constitution,

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and the rule of excluding the one day and including the other, the appointment was made more than six months prior to the election, and the vacancy was properly filled by election at the general election.

APPEAL from Wilcox Circuit Court.

Heard before Hon. B. M. MILLER.

Quo warranto by the state, on the relation of J. N. Stanford and others, to try the title of J. F. Foster to the office of probate judge of Wilcox county. From a judgment ousting respondent, he appeals. Affirmed.

The probate judge of Wilcox county died May 6, 1906, and Foster was appointed in his stead. The general election for state and county officers next after the death of the probate judge came on November 6, 1906. This election was not held for the election of probate judges; they holding on until the general election in the year 1910. Stanford and Foster ran in the primaries. Stanford, receiving the higher vote, was declared the nominee, and at the general election held on November 6, 1906, was voted for and elected probate judge of Wilcox county. Foster declined to surrender the office, claiming that his appointment was within less than six months from the date of the next general election and that the vacancy occurred in the office less than six months next preceding the general election. Stanford brought quo warranto to try title to the office, and had judgment in the lower court, ousting Foster, who appeals.

A. D. PITTS, and DANIEL PARTRIDGE, JR., for appellant.—No brief came to the reporter.

MILLER & BONNER, and E. N. & P. E. JONES, and MALLORY & MALLORY, for appellee.—No brief came to the reporter.

TYSON, C. J.—This is an action in the nature of quo warranto, brought on the information of Jonathan N. Stanford for the purpose of trying the title of the respondent to the office of probate judge of Wilcox county, and also to have his alleged right to that office

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adjudged. The respondent's right to the office, and, for that matter, that of the relator, depends solely upon the determination of the question whether six months had intervened between the occurrence of the vacancy created by the death of Judge Beck on the 6th day of May, 1906, and the general election held on the 6th day of November following. The constitutional provision conferring the right of appointment of the respondent to the office to fill the vacancy created by the death of Beck and fixing his term is in this language: "Vacancies in the office of any of the justices of the Supreme Court or judges who hold office by election, or chancellors of this state, shall be filled by appointment by the Governor. The appointee shall hold his office until the next general election for any state officer held at least six months after the vacancy occurs, and until his successor is elected and qualified; the successor chosen at such election shall hold office for the unexpired term and until his successor is elected and qualified." It is admitted that the word "months" means calendar months; and it cannot be seriously doubted that the words "at least six months" mean no more than six months. It will thus be seen that the right of the respective claimants to the office is dependent upon a mere computation of time. The contention of appellant, respondent below, seems to be that in making the computation we must exclude the day of Beck's death, to-wit, the 6th of May, and that, if this method of calculation is adopted, the six months did not expire until after the 6th of November, the day on which the election was held. That of the relator is that, as the vacancy occurred on the 6th of May and the governor could have filled the vacancy on that day, that day should not be excluded, and therefore the six months expired at midnight of November 5th; but, if this be not so, and the rule be adopted of excluding the first day and including the last, still the six months period between the occurrence of the vacancy and the election had elapsed.

We are of the opinion that the appellee's contention is the correct one. It is certainly in accord with the rule of computation which has obtained in this court



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since the decision of *Garner v. Johnson*, 22 Ala. 494, in the year 1853. In that case the plaintiffs in error had sued out a writ of *capias ad respondendum* in *assumpsit* on the 15th day of October, 1851, against the defendant Johnson. This writ was served on the day of its issuance, and was returnable to the next term of the court, which convened on Monday, the 20th day of the same month. The defendant by plea sought to abate the writ, because not sued out five entire days before the day on which the term of the court commenced. The statute invoked in support of the plea required the writ to be executed at least five days before the return thereof. The court held the plea bad. It said, among other things: "The statute does not employ the term 'entire days,' but requires that the writ shall be executed at least five days before the return thereof; and if the writ be sued out within five days before the beginning of the term, it may be abated on plea of the defendant. Now, whatever may be the ruling of other courts in regard to the point involved in this plea, it has been the uniform practice in this state, so far as we are advised, in computing time which intervenes between the issue of the writ and the beginning of the term to which it is made returnable, to exclude one day and include the other. A writ issued and served on Wednesday, which is returnable to a term to commence on Monday, has been uniformly esteemed as well issued and properly returnable. Had the statute said it shall be issued five entire days before the first day of the term, we are not prepared to say but that the rule would be different." The rule here announced has been followed, and this case cited with approval, in *Allen v. Elliott*, 67 Ala. 432, and *Thower v. Brandon*, 89 Ala. 406, 7 South. 442. In *Bernstein v. Humes*, 60 Ala. 583, 31 Am. Rep. 52, this court, construing the statute suspending the statute of limitations from January 11, 1861, to September 21, 1865, using the common method of subtraction, computed the time between the two dates to be 4 years, 8 months and 10 days. By the same method 6 months necessarily intervened between the 6th of May and the 6th of November. So, then, whether we include the

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first day in the computation, or exclude it and include the last, the result will be the same; and in order to hold otherwise we must exclude the day on which the vacancy occurred and the day on which the election was held.

The question presented and decided in *Garner v. Johnson, supra*, seems to have arisen before the adoption of the statute now constituting section 11 of the Code of 1896, which fixes the rule of computation where "the time within which any act is provided by law to be done," and to have been based upon the common law. But, whether it was or not, we feel constrained to follow it as declaring the rule of computation at common law in this state. It is fair to presume that the framers of the Constitution had in mind the rule of computation as declared and applied in this decision and those following it, when they incorporated the provision under consideration into that instrument; and, unless there is something in the constitutional provision which would clearly indicate that a different rule of computation was intended than the one established by these decisions, the one so established and applied by them should be followed. It is clear that no such intention is expressed. To the contrary, in view of the dominant purpose of the provision to secure to the people the right to elect, rather than to secure to the appointee a definite and fixed term, which is merely secondary and subsidiary, this purpose is certainly best conserved by the application of the rule as announced in *Garner v. Johnson, supra*, rather than the one which would defeat the right of election.

Affirmed. All the Justices concurring.

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**Ex Parte Walker, et al.***Mandamus.*

(Decided Feb. 14th, 1907. 43 So. Rep. 130.)

*Mandamus; Subject of Relief; Proceedings of Court; Record.*—As each court must, of necessity, make up its own record and certify to them, the supreme court will not compel the circuit court to take and treat as a bill of exceptions a paper which had been stricken from its records by the probate court prior to the appeal to the circuit court.

**Original petition in Supreme Court.**

Trimble Walker and Adele Baker were the contestants in a cause pending in the probate court of Montgomery county, wherein B. W. Walker was the contestee on a petition to probate the will of their grandmother. Judgment was rendered for contestee on the 23d day of August, 1904, and an appeal was taken from said judgment to the circuit court of Montgomery county on the 22d day of September, 1904, and a bill of exceptions filed in the probate court in said cause on the 6th of September, 1904, and signed by the judge of probate on the 18th of February, 1905. After the adjournment of said probate court, and after the expiration of six months from the time said judgment was rendered in said court, and on the 23d day of March, 1905, the contestee filed a motion in the probate court to strike the bill of exceptions, and on the 29th day of April, 1905, the probate court entered an order striking said bill of exceptions from the record. On the 24th of May, 1905, contestants filed a motion to restore said bill of exceptions to the record in said cause, and said motion was overruled by the court. On May 29, 1905, the contestant in open court and while the court was in session made an oral motion for a writ of certiorari, directed to the judge of the probate court, commanding him to send up the complete record in the cause. The

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motion was granted. A writ of certiorari was issued, directed to the judge of probate, and commanded him to send up the full record in the case. Responding to this writ, the judge of probate sent up what he termed a "true and complete transcript" in said cause, and on his return made the following indorsement: "The paper purporting to be a bill of exceptions was by some inadvertence marked 'Filed' on the 6th of September, 1904, before it was signed. Afterwards said paper was stricken from the file in pursuance of the order of this court on the proceedings and for the cause shown in the order of this court, a transcript of which is certified to the circuit court as a part of this return. The original of said paper so struck, marked '10,' is hereby sent up to the circuit court, but not as a part of the record of this court." On June 2, 1905, petitioners filed in the circuit court a petition praying that "the bill of exceptions in its present shape, as sent up by said probate judge in response to the writ of certiorari issued to him by this court, be restored to the record in this case, and that the same be treated and considered by this court as the proper and legal bill of exceptions in this case." This motion was refused. Contestant filed another motion, setting up a lot of facts concerning the bill of exceptions, and attaching the bill of exceptions as originally filed, with corrections made as suggested by the other party, and prayed that it be taken and considered by this court as the bill of exceptions. This motion was also denied. Upon these facts petition for mandamus was filed, seeking to compel the judge of the circuit court of Montgomery county to treat the paper filed in the probate court and stricken from the record there as the bill of exceptions in the appeal then pending in the Montgomery circuit court. Petition for mandamus was denied.

PEARSON & RICHARDSON, for appellant.—This cause is a novel one but the following authorities sustain the proposition that the proper remedy is by writ of mandamus.—*Ex parte Jones*, 133 Ala. 212; *Ex parte Woodruff*, 123 Ala. 99; *Wilson v. Duncan*, 114 Ala. 659; *Ex*

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*parta Tower Mfg. Co.*, 103 Ala. 415; *Ex parte Hayes*, 92 Ala. 120; *In re Barbour Paving Co.*, 67 L. R. A. 761. It does not appear which of the two motions is alluded to by the pleader, whether the one that the bill of exceptions be stricken or the one that it be restored to the record, and hence, this ground of defense will not be considered.—13 Enc. P. & P. 716. There can be no appeal from a void order or judgment.—*McMillan v. City of Gadsden*, 39 South. 569. The circuit court has the power to exercise a general superintendence over all inferior jurisdictions.—Section 918, Code 1896. This court has similar power over the circuit court.—Section 3826, Code 1896.

E. J. PARSONS, and GUNTER & GUNTER, for appellee. —Mandamus is not the proper remedy.—*Bibb v. Gaston*, 40 South. 936; *Ex parte Campbell*, 30 South. 385; *Ex parte Huckabee*, 71 Ala. 427; *Ex parte Ellston*, 25 Ala. 72. Every court has the power to control its own records and make them speak the truth.—*Ex parte Henderson*, 84 Ala. 36; *Pearce v. Clements*, 72 Ala. 256; *Moore v. Lasseur*, 33 Ala. 237; *Norris v. Cottrell*, 20 Ala. 304; *Stephens v. Norris*, 15 Ala. 79. The bill of exceptions never became a part of the record in the circuit court.—*L. & N. R. R. Co. v. Malone*, 116 Ala. 600. It was appellant's duty to show affirmatively that the bill of exceptions was signed in time.—*Capehart v. McGahey*, 40 South. 657.

SIMPSON, J.—The application for a writ of mandamus in this case seeks to have this court compel the judge of the circuit court of Montgomery county to treat as a bill of exceptions a certain paper which had been stricken from the record of the probate court of Montgomery county previous to the appeal from that court to the circuit court. All appellate courts, in hearing appeals from inferior courts, must necessarily treat the record of the court below, as certified by the said court, as the record in the case. Each court must make out its own record and certify to the same, and for the appellate court to open the record and receive

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testimony, on which to add to the record certain things which the court itself has certified not to be in the record, would open a field of inquiry entirely inconsistent with the principles which govern in cases of appeal. If the lower court has acted erroneously, in excluding anything from the record which properly belonged therein, or in inserting anything therein which was not entitled to a place in the record, the matter should be remedied in the court where the error occurred, or by appropriate action in the superior court, either by appeal or by some writ to compel the performance of a plain duty. Under our statutes and decisions, bills of exceptions, when properly signed, become parts of the record, and while our statutes have provided a way by which a bill of exceptions may be established when the judge of the inferior court refuses to sign it, and while this court will also inquire whether a bill of exceptions has been signed within the time prescribed by law, so as to become a part of the record, yet no way has been provided by which appellate courts can otherwise change the records of the inferior courts.—*Pearce v. Clements*, 73 Ala. 256; *Ex parte Henderson*, 84 Ala. 36, 4 South. 284; *L. & N. R. Co. v. Malone*, 116 Ala. 600, 603, 604, 22 South. 897.

The writ is denied.

TYSON, C. J., and HARALSON and DENSON, JJ., concur.

## Ex Parte Randall.

*Mundamus.*

(Decided Dec. 18th, 1906. 42 So. Rep. 870.)

1. *Attorney and Client; Duty to Client; Acting for Adverse Party.*—Where the defendant's attorney is authorized in writing by plaintiff to have a cause dismissed, and made such motion under such authority, it is not a representation of both parties by him.

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2. *Same; Settlement by Client.*—A party has a right to make any settlement or compromise he pleases with the other party and to order a dismissal of the suit, if he be plaintiff, whether he has employed counsel or not.
3. *Parties Plaintiffs; Persons Who May Sue; Real Party in Interest.*—The party to whom payment can be legally made, and who can legally discharge the debtor may bring the suit in his name, although it be for the use of some other person to whom he is bound to pay the money, when collected.
4. *Same.*—Where it is shown that a party was informed of the transfer of the claim to him and knew of the institution of suit in his name, and did not disavow the trust, his acceptance of the trust will be resumed.
5. *Same; Right to Sue in Name of Another.*—The beneficial owner of a chose in action, or property, has the right to use the name of the person holding the legal title, in a suit to recover the money or property, upon indemnifying the holder of the legal title against costs, and the owner of the legal title has no right to dismiss a suit so brought.
6. *Same.*—Party holding the legal title to the chose in action whose name is used as the party plaintiff by the person having the beneficial interest therein, has the right to be heard on the question of fact as to whether the beneficial interest is in the party who claims it.

#### Original Petition in Supreme Court.

Mandamus, on the relation of W. H. Randall, against the Yellow Pine Lumber Company, to compel the dismissal of a suit. Writ denied.

R. W. STOUTZ, for appellant.—An attorney is but a special agent.—*Robinson v. Murphy*, 69 Ala. 547; *Chapman v. Cowles*, 41 Ala. 103. A client may dismiss a suit without knowledge or assent of the attorney.—*White v. Nance*, 16 Ala. 345; *Cameron v. Boeger*, 93 Am. St. Rep. 165; *Williams v. Miles*, 93 Neb. 851; *Peoples Bank v. Superior Court*, 43 Am. St. Rep. 147. A client may settle or compromise with the opposite party and exclude the attorney's lien.—3 A. & E. Ency. of Law, 465. Only the client can enter a retraxit.—*Thomason v. Odom*, 31 Ala. 108; 4 Cyc. 937. A stranger will not be allowed to interfere and prevent dismissal.

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sal of the cause.—*Gay v. Orrcutt*, 169 Mo. 400; 14 Cyc. 410.

SAMUEL B. BROWNE, pro se.

SIMPSON, J.—This was an application for a writ of mandamus to the judge of the Thirteenth judicial circuit to compel the dismissal of a suit. The facts are that a suit was brought in said court by lawyers of Moble, in the name of W. H. Randall, against the Yellow Pine Lumber Company, in the circuit court of Washington county; the complaint contained the general counts and being based on an account. The suit was commenced October 9, 1903. After said case had been to the Supreme Court and returned to the docket, it was called for trial on March 6, 1906, at which time counsel for defendant presented to the court a power of attorney from the plaintiff authorizing the dismissal of the cause, and stating that he had never authorized any one to bring the suit and did not wish it prosecuted any further. The court refused to hear the said attorney, because he was the attorney for the defendant and could not be allowed to represent both sides of the case. The plaintiff himself then appeared and made the same statement, to the effect that he had not employed any one to bring the suit, that he did not desire to prosecute it further, and moved to dismiss the case, which motion was refused.

We will say in the outset that, while it is true that an attorney cannot represent both sides in a litigated case, yet, when the plaintiff chooses to sign a paper authorizing the attorney for the defendant to dismiss the case, the presentation of said paper to the court by the attorney for the defendant is not such representation of both parties as is forbidden, but he is still acting in the interest of his client, and merely carrying out the dismissal which the plaintiff has authorized in the interest of the defendant. It is also true that the client, whether he has employed the attorney or not, has a right to make any settlement or compromise he may please with the defendant, and to order the dismissal



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of his case, if he so desires.—Weeks on Attorneys, §§ 212, 250; *White v. Nance*, 16 Ala. 345, 347, 348; *Cameron v. Boeger*, 200 Ill. 84, 65 N. E. 690, 93 Am. St. Rep. 165, 169, and note at page 171; *Williams v. Miles*, (Neb.) 89 N. W. 455; 3 Am. & Eng. Ency. Law (2d Ed.) pp. 328, 349, 465; 4 Cyc. 927.

But the answer of the respondent and the affidavits show that the facts made known to the court were that said plaintiff had been the bookkeeper of the "D. J. McDonald Stone Company," and also the "McDonald Lumber Company"; that, while he was acting in that capacity, the account which is here sued on was claimed to be due to one Hess by the Yellow Pine Lumber Company (the defendant in the action), to which said lumber company claimed a set-off; that said Hess was indebted to both companies, and D. J. McDonald was a stockholder in all three corporations. So the account in question was assigned to said petitioner, W. H. Randall, who was to collect the amount due on the same and hold the proceeds in trust for distribution between the D. J. McDonald Stone Company and the McDonald Lumber Company, according to their interests. Said Randall in his affidavit states that he is not in the slightest interested in the litigation; that, at the time said account was assigned to him, he was not informed of the fact, "though he did learn afterwards that such transfer had been made," and that at a previous term of the court he received a letter from counsel for defendant requesting his personal attendance on the trial of said cause at a witness for defendant; and that said D. J. McDonald instructed said Randall, who was then in his employ, to remain at home on the day the sheriff would be looking for him to serve the subpoena on him, and that, if McDonald needed him, he would wire him. It was admitted that the attorneys who brought the suit were employed by said D. J. McDonald Stone Company, and, when the plaintiff sought to have the case dismissed, said parties produced a bond to hold said Randall harmless from all costs and liabilities on account of said suit, and that said Randall admitted that the sureties on said bond were abundantly sufficient as sureties.

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It is insisted by the petitioner, as one reason why the mandamus should be awarded, that under section 28 of the Code of 1896 this suit could not be maintained in the name of the petitioner, because he is not "the party really interested." The rule which has been uniformly followed on this subject is that, if the party suing is "the party to whom payment can legally be made and who can legally discharge the debtor, the action may be brought in his name, although the money, when collected, is not for his use, but for the use of some other person or persons, to whose use he is required to apply it, or to whom he is bound to pay it."—*Yerby v. Sexton*, 48 Ala. 311; *Hirschfelder v. Mitchell*, 54 Ala. 419; *Rice v. Rice*, 106 Ala. 636, 637, 638, 17 South. 628.

It is next insisted that the plaintiff had never accepted the trust. As the evidence shows that he was informed of the transfer after it was made, and knew for some time of the institution of the suit in his name, and made no disavowal of the trust, his acceptance will be presumed.—1 Beach on Trusts & Trustees, p. 50, § 39; also pages 877, 878, § 375.

The final contention is that, as Randall was the only party plaintiff to the case, he, and he alone, had the right to control it or dismiss it, and no one else had a right to intervene and stay the execution of his demand. This question was presented, in a negative way, to this court in an early day. A suit was brought in the name of Brazier, but during the progress of the case the plaintiff himself filed an affidavit, stating that it was commenced and carried on without his knowledge, and asked that the suit be dismissed. The lower court ordered the party claiming the beneficial interest to give security for costs, and, that not being done by the next term of the court, the case was dismissed, although the person interested then offered to give the security. This court refused to reverse, on the ground that the correctness of the order of dismissal could not be inquired into on writ of error; but the court said it was the duty of the court to protect the rights and interests of those who are beneficially interested "against the improper interference of the plaintiff on the record, but the only

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mode to correct erroneous action in this particular is by mandamus."—*Brazier v. Tarver*, 4 Ala. 569, 570. It was also held that one partner could not dismiss the case, "so far as his interest was concerned," without the consent of the other partner, and the court recognizes it as a well-known principle that a mere nominal plaintiff will not be permitted "to dismiss a suit, or otherwise interfere with the just rights of the equitable owner."—*Cunningham v. Carpenter*, 10 Ala. 109, 112. See, also, *Harris v. Swanson*, 62 Ala. 299, 300. It is also stated as unquestioned law that the assignee of a judgment can sue out an execution thereon in the plaintiff's name for his benefit.—*Haden v. Walker*, 5 Ala. 86, 88. While this court, in a later case, speaking through Judge Dargan, held that the plaintiff, in an action of ejectment, could dismiss the case, and that the party at whose instance the suit had been brought could not prevent him from exercising that right, yet it will be observed that, in that case, the party at whose instance the suit was brought held no contract relation with the party in whose name it was brought, but merely claimed that she could not make out her claim to dower interest because of the loss of some intermediate deed. It will be observed, also, that the court bases the decision on the principle that, in an action of ejectment, the court could look only to the legal title, and the learned justice remarks that: "It is true, a suit at law may be carried on by one who is beneficially entitled to the money, in the name of him in whom is vested the legal title, and a court of law will protect the rights of him beneficially interested, and will not permit the plaintiff to dismiss the suit, if the party entitled to the proceeds of the recovery will indemnify him against the cost to which he may be subjected. But the suits that may be thus prosecuted are those brought to recover a sum of money, and perhaps for a specific chattel, where the title is in one, but the beneficial interest is in another."—*White v. Nance*, 16 Ala. 345, 347. This court has also declared, in a more recent case, that, if there is another party jointly interested in the property sought to be recovered, the plaintiff may join the others, whether the

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other party be willing, or not, upon indemnifying him against costs.—*Bolton v. Cuthbert*, 132 Ala. 403, 406, 31 South. 358, 90 Am. St. Rep. 914. In a case much more recent than the *White-Nance Case*, *spura*, this court has applied this principle to an action of ejectment, holding that, where a party has sold and conveyed land while it is in the adverse possession of another, the vendee has a right to bring suit for the land in the name of the vendor, and that the grantor cannot prevent such use of his name.—*Pearson v. King*, 99 Ala. 126, 10 South. 919. And the court says that “courts of law long ago recognized the right of a transferee of a chose in action, which was not assignable under the common law, to use the name of the transferor in a suit thereon.”—Page 128 of 99 Ala., page 919 of 10 South.

It is true that, in most of the foregoing cases, there was some contract relation existing between the parties, such as vendor and vendee, or assignor and assignee; but there is another class of cases in which this principle has been recognized, and which are analogous in all points to the one now under consideration, to-wit, that “where there is a trustee and cestui que trust, the cestui que trust may bring an action at law in the name of his trustee, whenever necessary \* \* \* for the protection of the trust property,” or for the recovery of money to which the cestui que trust is entitled, “and the trustee can neither release the right of action nor discontinue the suit, but he may ask indemnity against cost.”—2 Beach on Trusts & Trustees, p. 1055, § 459; *Hart v. W. R. R.*, 13 Metc. 99, 108, 46 Am. Dec. 719; *Fire Insurance Co. v. Hutchinson*, 21 N. J. Eq. 107, 117; *Commissioners v. Johnson*, 36 N. J. Eq. 211, 212. The principle which we extract from all these cases, and which seems to be consonant with reason and right, is that, where one party holds the legal title and is the proper party to sue, while another has the beneficial interest, in a chose in action or property, the latter has a right to use the name of the former in a suit to recover the money or property, upon indemnifying said party against costs, and the former has no right to dismiss a

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suit so brought. The cases cited show that no distinction is made between cases that are brought without mention of the party for whose use the suit is brought, and those which specially mention the use, and we can see no reason why there should be any distinction. It is the right which the law seeks to protect, and, if the party in whose name the suit is brought is fully indemnified against cost, we cannot see what possible injury can occur to him by the bringing or carrying on of the suit. Courts of justice sit for the purpose of securing and protecting the real interests of parties, and not for dealing with abstractions.

The petitioner had and has a right to be fully heard on the question of fact as to whether the beneficial interest is in the parties who claim it; but, if that beneficial interest be in them, as the affidavits seem to establish, he had no right to insist on the dismissal of the case.

The writ is denied.

TYSON, C. J., and DOWDELL and ANDERSON, JJ., concur.

## State ex rel. Ducourneau v. Langan.

### *Mandamus to Compel Issuance of License.*

(Decided March 2nd, 1907. 43 So. Rep. 187.)

**Mandamus; Acts of Public Officers; Matters of Description.**—Mandamus does not lie to compel an officer to issue a license where the performance of that duty rests upon the ascertainment of facts or the existence of conditions, to be determined by such officer, in his judgment or discretion.

APPEAL from Mobile Circuit Court.

Heard before Hon. SAMUEL B. BROWNE.

Petition for mandamus by the State, on the relation of Leon Ducourneau, to compel David Langan, as tax

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collector of the city of Mobile, to issue to relator a license. From a judgment denying the writ, on sustaining a demurrer to the petition, relator appeals. Affirmed.

The petition alleges that the relator is a citizen of Mobile, and is conducting a liquor business in the city of Mobile, for which he has a license; that Langan is tax collector of the city of Mobile, and as such has the issuance of license; that it is necessary to have the signature of the mayor, and that the mayor refuses to sign such license because the business is to be conducted in a district of the city where liquors cannot be sold; that the city has no authority to restrain the business for which license is sought, but may regulate the same; that a license has been prescribed for that character of business, setting out the ordinance; that certain limits are prescribed in which liquor may be sold, setting those limits out; that in these limits no effort is made by the authorities to put down vice and immoral practices; and that it is not a suitable place for a theater or music hall where liquors are to be sold. It further alleges that liquors are served in certain hotels and restaurants, to the music of bands, outside of the territory, and that the refusal of license to petitioner is unjust and a discrimination. Respondents demurred to the petition because the charter of the city of Mobile (section 21) expressly authorizes the general council of said city to adopt ordinances in the matter of "the licensing and regulating of retail liquor dealers," and also in the matter of theatrical performances and other entertainments and amusements, and that it appears upon the face of said petition for mandamus that said ordinances regulating said vocation when carried on together, by confining them on and after October 31, 1906—that is to say, "theaters or variety shows, where songs, music, or dancing is allowed, and wines and vinous, malt, or spirituous liquors are sold, or where men or women are employed to serve wine and vinous, malt, or spirituous liquors, on the floor or in the wine room"—to that locality or portion of the city of Mobile bounded by "Lawrence street on the east, Wilkerson street on the

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west, St. Michel street on the south, and St. Louis street on the north," is a valid exercise of the power conferred by the legislature of Alabama upon the general council of the city of Mobile. These demurrers were sustained, and the petition amended, elaborating the conditions existing in the district to which places of the kind license is here sought for is confined, and the same demurrer was refiled to the amended petition and sustained.

CHARLES L. BROMBERG, and FREDERICK G. BROMBERG. for appellant.—A municipal corporation possesses and can exercise those powers granted in express words, those necessarily or fairly implied incident to the powers expressly granted, those essential to declared objects and purposes of the corporation, and none other.—*New Decatur v. Berry*, 90 Ala. 433. Any reasonable doubt as to the existence of the power of any municipality to enact an ordinance should be resolved against the municipality.—21 Enc. of Law, 950. Where the power to legislate on a given subject is conferred, but the mode is not prescribed the courts have full power to pass upon such ordinance and unless it be a reasonable exercise of the power it will be declared invalid.—21 Enc. of Law, 990; *Greensboro v. Ehrenreich*, 80 Ala. 579. And must be reasonable and not arbitrary or oppressive.—*Greensboro v. Ehrenreich*, *supra*; *Oxanna v. Allen*, 90 Ala. 468; 21 Enc. of Law, 985; Dillon on Municipal Corporations (4th Ed.) §§ 319-321. The test of reasonableness is laid down in the following authorities.—21 Enc. of Law, 986; Dillon on Municipal Corporations, *supra*; 2 Abbott's Municipal Corporations, p. 1341. An ordinance must be general in its nature and impartial in its operations.—21 Enc. of Law, 983; *Greensboro v. Ehrenreich*, *supra*. The charter power of the city of Mobile does not authorize the passage of an ordinance which in its nature is prohibitive notwithstanding the power to regulate theatrical and other amusements and entertainments.—*Ex parte Burnett*, 30 Ala. 461.

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B. B. BOONE, and R. M. SMITH, for appellee.—The appeal should be dismissed because the petition itself shows that the tax collector cannot issue the license demanded. It requires the concurrent action of the mayor, and the relator must specifically point out the relief which he seeks. The prayer of the bill is directed only against Langan and not against Lyons. Even in equity a prayer is essential to a recovery.—*Driver v. Fortner*, 5 Port. 9. The license ordinance was neither discriminatory nor prohibitory but is a mere regulation of the liquor business. The power is given to limit the employment or occupation to a particular locality.—*Ex parte Byrd*, 84 Ala. 17; *State v. Reid*, 1 Ala. 612; *Shelton v. Mayor of Mobile*, 30 Ala. 540. The following cases state the rule as to when a license ordinance is prohibitory and when not.—*Ex parte Sykes*, 102 Ala. 177; *Intendant v. Chandler*, 6 Ala. 899.

That the city has the power to prohibit theatrical performances and dancing where liquors are sold cannot be doubted.—*State v. Gearhardt*, 33 L. R. A. 213; *Ex parte Smith & Keating*, 38 Cal. 702; *McQuillan's Municipal Ordinances*, p. 757.

MCCLELLAN, J.—This is a petition for writ of mandamus to compel the issuance of a license to the relator to operate a theater or variety show wherein wines and vinous, spirituous, or malt liquors are sold or served. Demurrer was sustained to the petition, and, petitioner declining to plead further, the writ was denied.

Regardless of the validity or invalidity of the ordinance prescribing territorial limits, within the city of Mobile, in which only the business here contemplated by the relator is licensable, we are of the opinion that the judgment of the circuit court is well rendered. It is settled that writ of mandamus will not issue to control the exercise of judgment or discretion. It is only a ministerial, not a judicial or quasi judicial, duty to compel the performance of which the writ will issue. Wherever the duty, the performance of which is sought to be enforced, rests upon the ascertainment of facts or



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the existence of conditions by the officer against whom it is prayed, his judgment or discretion being invoked, the writ is not available to the petitioner or relator.—*Taylor v. Kolb*, 100 Ala. 603, 13 South. 779; 19 Am. & Eng. Ency. Law, p. 821, and note. In the charter of the city of Mobile (Acts 1900-01, p. 2375) it is provided that “no license of any kind shall be granted except to respectable people and for lawful business,” and revocation of issued license may be, upon conditions stated, had by the mayor’s action. It is evident that judgment and discretion are reposed as conditions to the issuance of license in this municipality, and that the writ cannot run to control it in behalf of this relator.—*Dunbar v. Frazer*, 78 Ala. 538; *Ramagnano v. Crook*, 85 Ala. 226, 3 South. 845.

The petition shows that the mayor, whose concurrent act with that of the collector is essential to the issuance of a valid license, refused to permit the grant to relator of the license sought. It does not appear that the discretion or judgment exercised was abused to the prejudice of the relator. The judgment of the circuit court is affirmed.

Affirmed.

HARALSON, DOWDELL, and ANDERSON, JJ., concur.

## Southern Ry. Co. v. Dickens.

### *New Trial.*

(Decided Feb. 14th, 1907. 43 So. Rep. 121.)

*New Trial; Surprise and Mistake.*—Facts examined and stated, and it is held that under them plaintiff was properly granted a new trial on account of mistake and surprise.

APPEAL from Mobile Circuit Court.

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Action by Charles C. Dickens against the Southern Railway Company. From an order granting plaintiff a new trial, defendant appeals. Affirmed.

BESTOR, BESTOR & YOUNG, for appellant.—Admissions of a party against interest are admissible in evidence against him.—*Polly v. McCall*, 37 Ala. 20; *Humes v. O'Brian*, 74 Ala. 54; *L. & N. R. R. Co. v. Hurt*, 101 Ala. 36. So are his admissions in disparagement of his title.—*Jemison v. Smith*, 37 Ala. 185; *Arthur v. Gayle*, 38 Ala. 259. The motion to strike bill of exceptions should not be granted.—*M. & B. R. R. Co. v. Worthington*, 95 Ala. 602.

GREGORY L. & H. T. SMITH, and FRANCIS J. INGE, for appellee.—The court cannot consider the question presented by bill of exceptions because not signed in time.—*Lindsey v. Kenan*, 133 Ala. 532; *Andrews v. Meadow*, 133 Ala. 442; 133 Ala. 368; 132 Ala. 609; 128 Ala. 410; 135 Ala. 250. The description of the property involved in the suit may be amended.—*Russell v. Erwin*, 33 Ala. 44; *Haskins v. Ferris*, 23 Vt. 673; *Walker v. Fletcher*, 74 Me. 142. Counsel discuss other assignments of error but cite no authority.

HARALSON, J.—This action was before a justice of the peace to recover damages for the killing of a bull belonging to the plaintiff, Charles C. Dickens, by the defendant, the Southern Railway Company. It becomes necessary to state the facts.

The animal was killed on the 17th of December, 1902, and the trial was had before the justice, on the 31st of December, 1903. There was a judgment for the plaintiff, and the case was carried by certiorari to the circuit court, and a trial was there had on the 24th of January, 1906. The record shows that the defendant filed a plea of the statute of limitations of one year, on the day of the trial. The affirmative charge was given for defendant, and judgment was rendered accordingly, evidently on the plea. The plaintiff made a motion for a new trial, on account of mistake and surprise, which

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was granted. The appeal is from the order setting aside the judgment and granting a new trial. The grounds for the motion, as stated therein were, "Because at the time of the trial neither he (the plaintiff) nor his attorney knew that there was a plea of the statute of limitations filed in said cause, and because the plaintiff was thereby taken by surprise, and was not prepared to contest said plea of the statute of limitations, and because said suit was filed with H. P. Lewis, a justice of the peace, on or about October 1st, 1903 (less than a year after the animal was killed) and summons was issued by said justice and made returnable October 10th, 1903, which summons was served on the Southern Railway Company, within the time; that prior to the 10th of October, 1903, the said justice resigned; that afterwards, one Anderson was appointed to succeed the said Lewis, and after his appointment (he) issued a new summons, dated December 19th, 1903, instead of proceeding under the summons issued by the said Lewis, all of which was unknown to the plaintiff, and because the justice, Anderson, did not certify all of the papers to the said circuit court whereby the plaintiff was misled." The said Dickens testified, and there is no evidence to the contrary, that he did not know that said summons had been issued until he learned that fact on the trial, after all the evidence had been introduced and the general charge had been asked by defendant.

At the trial of this cause, the plaintiff stated his case to the jury, and in reply, the defendant's counsel stated that the defendant pleaded not guilty, and made no further statement. The fact that he had, on that day filed the plea of the statute of limitations, was not stated as one of the grounds of defense to the action; and as stated, in the motion for a new trial, neither the plaintiff nor his attorneys, at the time of the trial, knew that there was such a plea in the case. After the trial was over, the plaintiff made an investigation of the matter, and discovered the true state of facts, and, thereupon, made a motion for a new trial.

The evidence introduced on the trial of the motion, sustained the principal facts stated in the motion there-

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for, and there was no conflicting evidence. The court on this hearing, granted the motion, and, as before stated, the appeal is to reverse that order.

The general rule may be stated to be, that in order to obtain a new trial on the ground of mistake and surprise, it must be shown that they related to a material matter to the issue involved; that the injury resulted therefrom, and that the party seeking the new trial has not been guilty of negligence in the premises. It is also held that "the correct practice in such case is, for the party at once, upon the discovery of the cause, during the progress of the trial, which operates as a surprise on him, to move a continuance or postponement of the trial, and not attempt to avail himself of the chance of obtaining a verdict on the evidence he has been able to introduce, and if he should fail, then to apply for a new trial on the ground of surprise. To tolerate such a practice would have the effect of giving to the party surprised an unreasonable and unfaid advantage and tend to an unnecessary and improper consumption of the time of the court."—*Hoskins v. Hight*, 95 Ala. 286, 287, 11 South. 253; *Shipp's Adm'r v. Suggett's Adm'r*, 9 B. Mon. (Ky.) 5.

We are not prepared to say, that the court abused its discretion in granting the new trial. The affirmative charge for defendant was manifestly given because it appeared that the suit had been instituted more than a year after the bull had been killed. That the plaintiff was surprised by this plea satisfactorily appears. The plea was not filed until the day of the trial, and when called by plaintiff's counsel to state his defense, defendant's counsel replied, that he pleaded "not guilty," and made no further statement. This statement was well calculated to mislead plaintiff's attorney. Moreover, the suit had been instituted by plaintiff before Justice Lewis, within about nine months after the animal was killed, and was still pending in that court, undecided. When Lewis resigned his office, and Anderson was appointed his successor, it was the duty of the latter to take the case up as he found it on the docket of the justice's court, and try it; but instead of

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doing so, he issued, of his own motion, a new summons in the case, as if one had never been issued and served on defendant. What rightful authority he had to do so, does not appear. The resignation of Lewis did not abate the suit, and the action of Anderson in issuing another summons to defendant was entirely unauthorized. The plaintiff, as he stated in his affidavit for a new trial, as has been heretofore stated, did not know of the issuance of said new summons, nor did he learn of it until the trial of the cause, after all the evidence had been introduced and the general charge had been requested by the defendant. The request for this charge did not inform him, that this summons had been issued, and that a plea of the statute of limitations had been filed.

It does not appear that the plaintiff was guilty of such neglect in ascertaining those matters—especially in view of the fact that the filing of this plea had been veiled from him—as precludes him from asking and the court from granting the new trial. If it had not been done, the gravest injustice would have been done the plaintiff, in denying him the right to try his case on the merits.

The ruling of the court below is sustained.  
Affirmed.

TYSON, C. J., and DOWDELL and SIMPSON, JJ., concur.

## Witherington v. Gainer.

### *Trial of Right of Property.*

(Decided Feb. 14th, 1907. 43 So. Rep. 117.)

**Attachment; Claim Suit; Amendment of Affidavit.**—Where an affidavit in a claim suit states that the property attached is not the property of the attachment debtor, but is the property of the claimant, without stating the nature of the right or claim set up, such an affidavit is sufficient to give the court

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jurisdiction of the claim suit and to authorize an amendment setting forth the nature of the right or claim of claimant to the property.

APPEAL from Conecuh Circuit Court.

Heard before Hon. J. C. RICHARDSON.

Action of attachment by Charles Gainer against James Murray; J. E. Witherington, claimant. From the judgment, said claimant appeals. Reversed.

Charles Gainer had issued and levied an attachment upon the crops of James Murray to enforce a landlord's lien. There were two suits, and J. E. Witherington filed a claim bond and affidavit, setting out that the property levied upon in the attachment writ was the property of said Witherington. Both cases were tried together by agreement. The evidence tended to show that the claimant had no title to the property, but had a lien on the same for rent and advances. This evidence was excluded, and no exception was reserved to it. The claimant then made an offer to file an affidavit in each case, stating how and by virtue of what lien he claimed the property levied on under attachment, and offered these new affidavits as amendments to the original affidavit filed in the cause. The court declined to permit the amended affidavit to be filed, and to this action of the court the claimant excepted. This is the only point presented.

STALLWORTH & BURNETT, and JAMES A. STALLWORTH, for appellant.—The court erred in refusing the motion of claimant to amend his affidavit.—*Martin v. Meyer Bros.*, 112 Ala. 620; *Cade v. Floyd*, 120 Ala. 484; *Rhodes, et al. v. Smith*, 66 Ala. 177.

HAMILTON & CRUMPTON, and D. M. POWELL, for appellee.—The affidavit must state how claimant claimed, whether by title or lien.—Sec. 4145. Code 1896; *Ivey v. Coston*, 134 Ala. 259; *Bennett v. McKee*, 144 Ala. 601. In the absence of a statute authorizing it the court has no power to allow the amendment of an affidavit for attachment.—*Flechner v. Dickerson*, 65 Ala. 132; *Hall*

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*v. Brasselton*, 40 Ala. 406; *Sims v. Jacobson*, 51 Ala. 186.

**HARALSON, J.**—The amendment of section 4145 of the Code of 1896 provides, that "when the claim interposed is based on a mortgage or lien, the claimant must state in his affidavit, the nature of the right which he claims," etc.—Acts 1900-01, p. 106.

The claims filed in these cases, filed by the claimant, do not state the nature of the right which he sets up, but state, that the property upon which the attachment was levied is not the property of the defendant in attachment, but is the property of the affiant (claimant), and that he has a just claim thereto.

At the time of the trial, and after it had been entered upon the claimant sought to cure any defect in his claim in each of the cases, by making new affidavits, by way of amendments of his affidavits to claims, conforming them to the statute and moved the court to allow them, which motion the court overruled and claimant excepted. The appeal is to reverse these rulings.

The original affidavits were sufficient to give the court jurisdiction of the claim suits. The amendment of the affidavits to the claims in these cases, sought to set forth the nature of the plaintiff's claims to the property, and we feel constrained to hold, that they were admissible for this purpose, and to meet the evidence in the case. The amended affidavits should have been allowed, and the court erred in refusing to allow them to be made.—*Cade v. Floyd*, 120 Ala. 484, 492, 24 South. 944; *Rhodes v. Smith*, 66 Ala. 177, 178.

Reversed and remanded.

**TYYSON, C. J.**, and **SIMPSON and DENSON, JJ.**, concur.

[Alabama City, Gadsden & Attalla Ry. Co. v. Ventress.]

## Alabama City, Gadsden & Attalla Ry. Co. v. Ventress.

*Appeal from Order Overruling Demurrer to a Motion  
to Substitute Summons and Complaint.*

(Decided Feb. 7th, 1907. 42 So. Rep. 1017.)

1. *Records; Supplying Lost or Destroyed Records.*—Section 2647, Code 1896, is declaratory of the law as it already existed of the inherent power of the courts to substitute original papers or records which are lost or destroyed, in pending civil causes.
2. *Same; Procedure; Review; Acts Reviewable.*—The action of the court on pleadings for the substitution of lost or destroyed records in pending civil cases is not revisable upon appeal from an order on the pleadings. Such action can be reviewed only upon proper exception taken on appeal from final judgment in the cause.

APPEAL from Etowah Circuit Court.

Heard before Hon. W. W. HARALSON.

Action by Thomas Ventress against the Alabama City, Gadsden & Attalla Railway Company. From an order overruling a demurrer to a motion to substitute a summons and complaint, defendant appeals. Appeal dismissed.

This was an application to the circuit court to substitute summons and complaint, which was alleged to have been delivered to the clerk, and by him, with copy, delivered to the sheriff of the county for service. It is alleged in the motion that it is lost, and that the complaint accompanying the motion is a substantial copy of the complaint originally filed in said cause. Movant states that he does not know whether service has been perfected on the defendant or not, but his information is that it has. Demurrer was interposed to the motion: “(1) That said motion shows on its face that the cause has been discontinued. (2) The motion shows on its



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face that the cause of action in which movant seeks to substitute the summons and complaint has been discontinued by operation of law. (3) Motion shows on its face that the summons and complaint has abated. (4) It does not appear therefrom that the original summons and complaint has been lost or destroyed. (5) It appears therefrom that the defendant had not been served with a copy of said summons and complaint. (6) It does not appear that said summons and complaint can be substituted. (7) It does not give a sufficient reason why said motion was not made." Testimony was introduced pro and con as to the filing of the complaint, as to whether or not it had been served, and as to whether or not it was lost or destroyed. The court overruled the demurrers to the motion, and allowed the complaint substituted, from which action of the court this appeal is prosecuted.

BURNETT, HOOD & MURPHREE, for appellant.—Counsel discuss assignments of error but cite no authority.

CULLI & MARTIN, for appellee.—The appeal should be dismissed.—Sec. 2649 and 2652, Code 1896.

DOWDELL, J.—The appeal in this case is taken from an order of the circuit court allowing the substitution of lost papers in a pending cause in said court. Section 2647 of the Code of 1896 is as follows: "All courts have the inherent power, if original papers or records, pertaining to matters of civil jurisdiction, or to civil cases which are pending, or which have been determined, are lost or destroyed, to cause a substitution thereof, and the substituted paper or record is of equal validity with the original." This statute in effect is but declaratory of the law as it already existed. Independent of statutes, courts have power to substitute lost records.—Mayfield's Dig. vol. 4, p. 872.

From such order, granting the substitution of lost papers, no appeal lies unless authorized by statute. The appeal in this case is taken presumably under section 2652 of the Code of 1896. This is the only statute au-

[Alabama City, Gadsden & Aftalla Ry. Co. v. Ventress.]

thorizing an appeal from an order granting or refusing the substitution of lost papers or records. Section 2652 reads as follows: "From any order of a court of record, granting or refusing substitution under the preceding section, an appeal lies to the supreme court as from final judgments or decrees in civil cases; and bills of exceptions may be taken as in other civil cases. From an order of the justice of the peace, an appeal to the circuit or city court lies, as in other cases, and the trial is *de novo*." Section 2651, which precedes 2652, relates exclusively to a question of cost of substitution. It is evident that section 2651 was not intended by the reference contained in section 2652, since section 2651 contains no provision for any order granting or refusing a substitution of lost papers.

By reference to the Code of 1886, from which these sections were brought forward into the Code of 1896, it is made perfectly plain that the "preceding section" referred to in section 2652 is section 2649. The sections of the present Code from 2648 to 2652, both inclusive, were brought forward from the Code of 1886, and, when brought forward, were changed in their order by the codifier. Section 2648 of the present Code, which relates to the substitution of papers in a pending cause or proceeding, corresponds with section 657 of the old Code. Section 2649 of the present Code, which provides for the substitution of papers in a cause not pending, but after its determination, corresponds with section 658 of the old Code. Section 2652 of the present Code forms section 659 of the old Code. From this it will be seen that section 2649 of the present Code, which was section 658 of the old Code, must be the section intended by the reference in section 2652 (659) to the preceding section; and hence it follows that the only right of appeal given by statute from an order granting or refusing the substitution of lost papers is where the cause in which the substitution is made has been determined, and not in a pending cause.

[Howard, et al. v. Rutherford.]

The appeal in this case, being taken from an order in a pending cause, cannot be sustained, and therefore must be dismissed.

Appeal dismissed.

TYSON, C. J., and ANDERSON and McCLELLAN, JJ., concur.

## Howard *et al.* v. Rutherford.

### *Final Settlement of Estate.*

(Decided Feb. 5th, 1907. 43 So. Rep. 30.)

1. *Administrators; Account; Form.*—The statement of an administrator's account should not embrace charges against the distributees on their distributive shares. Such account should state the debits and credits regardless of the distributees shares, and after the ascertainment of the distributive share of each, the advancement made them should be charged against the distributive share of each.
2. *Same.*—Although the account was irregular in form, if the distributees of the estate have received all they are entitled to under a final distributive decree, they are not prejudiced by such irregularities.
3. *Same; Statement of Account.*—The court in stating the account made annual stops, crediting the administrator with the current expenses of administration, and charging him with interest at eight per cent on the dollar until the settlement, and in the calculation, deducted from the share of each distributee the advancement made to each during the particular year and charging the administrator with interest on the balance from the annual stops so made. Held, not prejudicial to the distributees.
4. *Same; Credits; Taxes.*—An administrator is properly credited with State and county taxes assessed against the estate and paid by the administrator.
5. *Same; Distribution; Charges; Board of Distributees.*—Under Sections 227 and 239, Code of 1896, the charges for board against the distributees were properly allowed the administra-

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tor on final settlement and distribution against their distributive shares.

6. *Same; Costs; Attorneys Fees; Guardian Ad litem.*—An administrator is properly allowed attorney's fees, guardian ad litem fees and costs on a settlement of his account.

APPEAL from Elmore Probate Court.

Heard before Hon. H. J. LANCASTER.

Judicial account by Frank Rutherford, as administrator, etc., to which Genelia Howard and others filed objections. From a decree allowing the account, objector appeal. Affirmed.

This is an appeal from the statement of account for final settlement of the administrator and from the judgment of the probate court passing the account and discharging the administrator. The distributees filed a contest, which, with the account and vouchers, is fully set out in the record, but not necessary to be here set out, as the errors assigned are sufficiently stated and discussed in the opinion of the court.

FRANK W. LULL, and E. S. THIGPEN, for appellant.—The administrator asked credit against the estate for amounts paid by him to the distributees. This could only be charged to the distributees after the share of each had been ascertained.—*Dickie v. Dickie*, 80 Ala. 57. The court should have stated an account and passed it as stated.—Sec. 215, Code 1896; *Dickie v. Dickie*, *supra*. The administrator should have been charged with full interest after August 3, 1898.—*May v. Green*, 75 Ala. 162; *Eubanks v. Clark*, 78 Ala. 73; *Johnson v. Hollifield*, 82 Ala. 130; *American Mortgage Co. v. Boyd*, 92 Ala. 143; *Englehart v. Young*, 76 Ala. 534. The board of Mrs. Howard should not have been allowed as a credit to the administrator and charged to her distributive share.—*Wright v. Wright*, 64 Ala. 88; 11 A. & E. Enc. of Law, 1172.

HOLLY & McMORRIS, for appelle.—The motion to charge administrator with interest on the full amount of money in his hands from August 3, 1898, was properly overruled. The court properly stated the account as to

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the minor.—*Ivey, et al. v. Coleman*, 42 Ala. 409 Where there is delay in making a final settlement the administrator is chargeable with interest not as a penalty but on the presumption that they could be made interest bearing and he is not liable for interest on a reasonable sum retained for meeting expenses.—*Noble v. Jackson*, 124 Ala. 311; 18 Cyc. 261. His costs and commissions on final settlement should be deducted before interest is charged.—18 Cyc. 263. It is proper to make annual rests and the administrator is not chargeable with interest on the expenditures for the annual period.—*Powell v. Powell*, 10 Ala. 900; 7 A. & E. Enc. of Law (1st Ed.) 429; 18 Cyc. 263. The measure of damages suffered by the distributees for delay in making final settlement is the interest on the money.—*Clark v. Knox*, 70 Ala. 607. Necessary expenses of minor distributees should be paid by the administrator.—Sec. 227, Code 1896. There was evidence of a contract between Howard and this administrator that she should pay board and it should be allowed.—Sec. 239, Code 1896. Attorney's fees for the guardian ad litem and the guardian ad litem's fees are proper charges against the distributive shares of the minor.—*Pinckard v. Pinckard*, 24 Ala. 250.

DOWDELL, J.—The appeal in this case is taken from the decree of the probate court on final settlement by the administrator, and is prosecuted by the two distributees of the estate; they being the only distributees and equally interested in the estate.

There can be no question that the form of the settlement of the account by the administrator was irregular. The statement of account between the administrator and the estate should not have embraced charges against the distributees on their distributive shares. Such charges should have been made and allowed the administrator against the distributive share after ascertainment of the distributive share of each distributee in the settlement of the estate.—*Dickie v. Dickie*, 80 Ala. 57. But if, in the statement of account and the calculations made by the court, although irregular in form, the dis-

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tributees received under the final decree their full distributive shares, and all which they were entitled to receive, as such distributees, no injury resulted, and hence no reversible error was committed.

The court, in its statement of the account, made annual stops and rests, crediting the administrator with current expenses of administration, and charging him with interest at 8 per cent. on the balance from year to year to date of final settlement, although the usual exculpatory affidavit was made. In this there is nothing of which the appellants can complain. The court in its calculations, in order to ascertain the amount due the distributees on the final settlement, deducted from the share of each distributee the allowances and advancements made by the administrator to each distributee during the particular year, and charged the administrator with interest on the balance from the stop or rest so made. In this we fail to see that injury resulted to the distributees.

There was no error in crediting the administrator's account with the state and county taxes paid by him, assessed against the estate.

The evidence on the question of board charged by the administrator against the distributees was conflicting. The testimony was taken ore tenus. The court had the witnesses before it. The evidence very clearly showed that there was an understanding and agreement between the widow, Mrs. Genella Howard, and the administrator, that the latter would charge the former board, though the amount was not stated. The evidence of the witnesses varied as to what was a reasonable charge. Some placed it as high as \$10 to \$12 a month, while others placed it as low as \$5. From all of the evidence the court fixed \$7 a month as a reasonable charge. Some of the witnesses placed it at this amount, and we are not prepared to differ from the court in its conclusion. Under sections 227 and 239 of the Code of 1896, the item of board against the distributees were properly allowed against their distributive shares on the final settlement and distribution by the administrator.

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We have carefully considered the evidence, and we are not prepared to say that the court was wrong in its

conclusions of fact from the evidence, in the allowance of certain items of credit that were disputed, and as to which there was a conflict in the testimony. The items of costs, attorney's fees, and guardian ad litem fees were properly apportioned and allowed.

We see no reason for disturbing the decree of the probate court, and the same will be here affirmed.

**Affirmed.**

TYSON, C. J., and ANDERSON and McCLELLAN, JJ.,  
concur.

## **Babcock v. Reeves, et al.**

### *Suit on Injunction Bond.*

(Decided Feb. 5th, 1907. 48 So. Rep. 21.)

1. *Injunction; Action on Bond; Parties Plaintiff.*—The injunction bond providing payment of all such damages and costs which any person may sustain, an action thereon may be properly brought by all the obligees therein for the use of one as the party who has been damaged by the injunction suit.
2. *Same; Complaint; Allegations of Breach; Sufficiency.*—An allegation in the complaint on an injunction bond that the bill had been dismissed and the injunction dissolved, was a sufficient averment of the breach.
3. *Same; Sufficiency of Bond.*—Where the complainants gave the bond under Section 788 and subsequently were ordered to give bond under Section 786, and made such bond, on a dissolution of the injunction, the obligees can maintain an action on the first bond, whether properly given under the statute or not, and it was good as a common law obligation and binding on the surety.
4. *Same; Evidence; Admissibility.*—It is proper to introduce the proceedings and decree in the injunction suit in support of an action on the bond.

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5. *Same; Damages; Instructions.*—It appearing that the injunction suit was against R. and L. and that R. had been active in the defense and had employed counsel therein, an instruction, asserting that if the attorney both represented R. and L., the services for the one being the same as for the other, and the attorney rendered the services for L. gratuitously, complainant would not be entitled to recover more than one-half of a reasonable attorney's fee, was erroneous and properly refused.

APPEAL from Pike Circuit Court.

Heard before Hon. H. A. PEARCE.

Action by L. Reeves and others against H. T. Babcock. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

The action was on an injunction bond, conditioned to pay the defendants in the injunction suit all damages and costs which any person may sustain by the suing out of the injunction. After demurrers to the complaint were overruled, the defendant, by way of answer, pleaded the general issue, and specially as follows: "Former adjudication, in that said suit is based on what purports to be an injunction bond executed in accordance with section 788 of the Code of 1896 of Alabama, by E. A. Baker, D. A. Baker, and H. T. Babcock on the 18th day of April, 1905, in a cause then pending in the chancery court of said county of Pike, wherein E. A. Baker was complainant, and L. Reeves, R. U. McClure, and Mrs. M. R. Sellers were respondents, and that, on the motion of all of said respondents that a bond be executed according to law, the chancellor decreed that a bond be executed in said cause in accordance with section 786 of said Code, and that in compliance with said decree complainants executed another bond on the 19th day of June, 1905, which bond was the lawful bond in said cause, and said first-named bond superseded and held for naught. \* \* \* For further plea defendants says that plaintiff is estopped from suing on said bond sued on in this action, because said plaintiff moved the chancery court to dissolve said injunction unless a sufficient and proper bond in accordance with the law should be executed by E. A. Baker, the complainant in said injunction suit; that in compliance with said motion the



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chancellor by decree required said E. A. Baker to execute another bond, and that said E. A. Baker in compliance therewith executed another injunction bond, which latter bond took the place and superseded the first bond executed by him." The plaintiff showed that L. Reeves had been active in the defense of the chancery suit, and had employed counsel, who managed the chancery suit from its inception to its conclusion, and that his services were reasonably worth from \$50 to \$75. At the conclusion of the evidence the defendant requested the following charges: Affirmative charge. "If the jury believe from the evidence that J. R. Motes represented both Reeves and McClure in said injunction suit equally, and the services rendered by said Motes was the same for the one as for the other, and covered by the evidence presented in this case, and a reasonable fee for all of said service is as shown by the evidence in this case, and said Motes rendered his said services for said McClure gratuitously, then the complainant would not be entitled to recover more than one-half of a reasonable fee as shown by the evidence." The court refused these charges.

D. A. BAKER, for appellant.—An injunction may be continued on complainant's application upon the terms of giving a new bond with new securities and if such be the terms of the order the first bond is discharged.—10 A. & E. Enc. of Law, 991. The filing of the new bond discharged the first bond given and it now furnishes no cause of action.—*Thorington v. Gould*, 59 Ala. 469; *Halsey v. Murray*, 112 Ala. 185; *Ex parte Forchheimer*, 15 South. 647. The allegations of the complaint fail to allege that plaintiff had been restrained by it from exercising or enjoining some right or privilege they desire to exercise.—10 Enc. P. & P. 1128. Defendant's demurrers should, therefore, have been sustained.—*Ansley v. Mock*, 8 Ala. 444; *Dunn v. Davis*, 37 Ala. 95; *Washington v. Timberlake*, 74 Ala. 259; *Dothard v. Shields*, 69 Ala. 135; *Rosser v. Timberlake*, 78 Ala. 162; *Bolling v. Tait*, 65 Ala. 417; *Jackson v. Millspaugh*, 100 Ala. 285.

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J. R. MOTES, for appellee.—The only authority of a chancery court to decree damages is a statute restrictive in its terms which applies only to bonds given under section 786 of the Code. The bond sued on was not given under that statute.—Sec. 793, Code 1896. It does not lie in the mouth of the complainant to say that his suit is too frivolous to authorize defendant to employ counsel to defend such suit.—*Rosser v. Timberlake*, 78 Ala. 163. Where a number of bonds are given suit may be brought on all.—*Frazer v. McWhorter*, 121 Ala. 308; s. c. 129 Ala. 450.

ANDERSON, J.—This suit was brought by all of the obligees under the bond, for the use of L. Reeves as the party who had been damaged by the injunction suit. The bond provides for the payment of "all such damages and costs which any person may sustain," is unlike the bond in the case of *Washington v. Timberlake*, 74 Ala. 259, but is within the influence of the case of *Smith v. Mutual Loan & Trust Co.*, 102 Ala. 282, 14 South. 625, and was properly brought.

The complainant avers that the bill was dismissed, and that the injunction was dissolved. This was a sufficient averment of a breach.—*Zeigler v. David*, 23 Ala. 127.

Whether the bond was properly given under the statute or not, it was good as a common-law obligation, and as such was binding on the surety, Babcock.—*Halsey v. Murray*, 112 Ala. 185, 20 South. 575. The facts set up in the defendant's special plea did not operate to discharge the first bond, and the demurrer to said plea was properly sustained.

The trial court did not err in permitting the plaintiff to introduce the proceedings and decree in the injunction case, or in refusing the charges requested by the defendant.

The judgment of the circuit court is affirmed.

TYSON, C. J., and DOWDELL and MCCLELLAN, JJ., concur.

[Pickler v. The State.]

**Pickler v. The State.***Action by State for Sale of Lands for Taxes.*

(Decided Feb. 5th, 1906. 42 So. Rep. 1018.)

*Taxation; Assessment to two Parties; Payment by One; Effect.—*

When lands are assessed to two different people for the same year, and one of such persons pays the taxes on such land for that year, the lien for taxes as to that land for that year is discharged, and no collection can be had under the other assessments.

APPEAL from DeKalb Circuit Court.

Heard before Hon. W. W. HARALSON.

The taxes on certain real estate having been assessed against this appellant, and not having been paid, the judge of probate of DeKalb county entered an order for the sale of the lands. An appeal from the order was taken to the circuit court, and upon issue tendered by the state the defendant replied: 1st. No valid assessment. 2. Want of notice; and, 3rd, that the lands upon which it was alleged that taxes were due, were at the time they were assessed to this defendant, in the adverse possession of other named parties, that they had assessed them for taxes and had paid the taxes on them, and that this fact was known to the assessor and collector, or could have been known by reasonable diligence. Demurrers were interposed to these last pleas, and sustained. On the trial the defendant offered to prove that each parcel of land assessed to him, and for which judgment was sought for taxes, was at the time of the assessment in the adverse possession of other named persons, who had given the same in for assessment and had paid the taxes on them. On motion of the state this testimony was excluded. These, and other questions not necessary to be here set out were presented for review, upon the finding of the trial court that taxes were due by this appellant upon the lands

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described therein. The court below made its findings of fact without the intervention of the jury, and certain findings were presented also for review, but as they are not mentioned in the opinion, they are not here set out.

LEE, LEE & LEE, for appellant.

MASSEY WILSON, Attorney General, for appellee.

MCCLELLAN, J.—This appeal is from a judgment of the circuit court, to which the matter had been removed by appellant under section 4069 of the Code of 1896. On proper request of the parties there was a special finding of the facts by the trial judge. There are many assignments of error, but the occasion requires the discussion of only one of them.

The appellant, on the trial below, offered testimony tending to show that the lands condemned to sale by the probate court decree had, prior to the rendition of that decree, been assessed for taxation for that tax year (1904) by other persons, who were in possession thereof at the time of assessment, and that the taxes due under said assessments had been by such persons in possession fully paid. On objection by the state, this proffered testimony was not admitted. The record shows an assessment of the same lands to appellant for the tax year 1904. So the case is one where there were two assessments of the same lands, and payment of the taxes assessed against them under one of the assessments. Where there are two assessments of the same lands by different persons for the same year, and payment of the taxes is made by one under his assessment, the lien for the taxes on that subject of taxation is wholly discharged, and no collection of the taxes under the other assessment can be made. The state is entitled to only one tax on one subject thereof, and the rule declared best gives effect to that truism.—*Wilbort v. Michel*, 42 La. Ann. 853, 8 South. 607; *Desty on Tax.* p. 812 et seq.; 2 *Cooley on Taxation*, p. 810, and note.

It follows that the trial court erred in refusing to admit testimony tending to show assessment and payment

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of the taxes by parties other than the appellant; and for this reason the judgment must be reversed, and the cause remanded.

Reversed and remanded.

TYSON, C. J., and DOWDELL and ANDERSON, JJ., concur.

**MEMORANDA**  
**OF CASES DECIDED DURING THE PERIOD EMBRACED IN**  
**THIS VOLUME, WHICH ARE ORDERED NOT TO**  
**BE REPORTED IN FULL.**

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**GILLILAND & SON, ET. AL. V. MARTIN.**

*Trespass De Bonis Asportavit.*

(Decided June 30, 1906. 42 South. 7.)

APPEAL from Tallapoosa Circuit Court.

Heard before Hon. S. L. BREWER.

D. H. RIDDLE, for appellant.

THOMAS L. BULGER, for appellee.

Reversed and remanded.

Opinion by DENSON, J.

WEAKLEY, C. J., and HARALSON and SIMPSON, JJ.,  
concur.

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**SOUTHERN RAILWAY CO. V. MORRIS.**

*Damages for Injury to a Horse.*

(Decided June 30, 1906. 42 South. 19.)

APPEAL from Colbert Circuit Court.

Heard before Hon. E. B. ALMON.

HUMES & SPEAKE, for appellant.

W. L. & W. P. CHITWOOD, for appellee.

Affirmed.

Opinion by ANDERSON, J.

WEAKLEY, C. J., TYSON and SIMPSON, JJ., concur.

## SINGLETON V. THE STATE.

*Habeas Corpus.*

(Decided June 30, 1906. 42 South. 23.)

APPEAL from Pike Probate Court.

Heard before Hon. A. C. EDMONDSON,

No counsel for appellant.

MASSEY WILSON, Attorney General, for State.

Affirmed.

Opinion by ANDERSON, J.

WEAKLEY, C. J., TYSON and SIMPSON, JJ., concur.

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SOUTHERN RAILWAY CO. V. COCHRAN.*Action for Injury to Passenger.*

(Decided June 30, 1906. 42 South. 100.)

APPEAL from Lamar Circuit Court.

Heard before Hon. S. H. SPROTT.

WEATHERLY &amp; STOKELY, for appellant.

WALTER NESMITH, and MARTIN &amp; MARTIN, for appellee.

Reversed and remanded.

Opinion by HARALSON, J.

All the Justices concur.

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HAWKINS V. TAYLOR, ET. AL.*Assumpsit.*

(Decided May 19th, 1906. 42 South. 128.)

APPEAL from St. Clair Circuit Court.

Heard before the Hon. J. A. BILBRO.

M. M. SMITH, for appellant.

No counsel marked for appellee.

Appeal dismissed.

Per curiam.

TYSON, J., dissents.

STATE EX REL TURNER V. COMMISSIONERS'  
COURT OF SHELBY CO.

*Mandamus.*

(Decided Feb. 16, 1906. 42 South. 126.,

APPEAL from Shelby Circuit Court.

Heard before Hon. JOHN PELHAM.

THOMAS L. BULGER, for appellant.

CECIL BROWNE, BROWNE & LEEPER, and WHITSON &  
DRYER, for appellee.

Affirmed.

Opinion by ANDERSON, J.

MCCLELLAN, C. J., HARALSON, SIMPSON and DENSON,  
JJ., concur.

TYSON and DOWDELL, JJ., dissent.

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HENRY V. WERT.

*Contest of Will.*

(Decided Dec. 30, 1906. 42 South. 405.)

APPEAL from Morgan Probate Court.

Heard before Hon. WILLIAM E. SKEGGS.

JOHN C. EYSTER, W. T. LOWE, and GEORGE H.  
PARKER, for appellant.

R. W. WALKER, T. C. MCCLELLAN, and E. W. GODBY,  
for appellee.

Reversed and remanded.

Opinion by DOWDELL, J.

All the Justices concur.

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CHAMBERS V. MORRIS.

*Ejectment.*

(Decided May 20th, 1906. 42 South. 549.)

APPEAL from Henry Circuit Court.

Heard before Hon. H. A. PEARCE.



P. A. McDANIEL, for appellant.

WILLIAM C. OATES, for appellee.

Affirmed.

Opinion by TYSON, C. J.

HARALSON, SIMPSON and DENSON, JJ., concur.

# SANDERS V. CUNNINGHAM & CO., ET AT.

*Equity.*

(Decided Nov. 29th, 1906. 42 South. 611.)

APPEAL from Jackson Chancery Court.

Heard before Hon. W. H. SIMPSON.

W. H. NORWOOD, and JOHN B. TALLEY, for appellant.

J. F. PROCTOR, and VIRGIL BOULDIN, for appellee.

Appeal dismissed.

Opinion by TYSON, C. J.

DOWDELL, ANDERSON, and McCLELLAN, JJ., concur.

# THOMAS V. DANIEL BROS.

*Detinue.*

(Decided Nov. 15th, 1906. 42 South. 623.)

APPEAL from Cherokee Circuit Court.

Heard before Hon. JAMES A. BILBRO.

C. DANIEL, for appellant.

BURNETT, HOOD & MURPHREE, for appellee.

Appeal dismissed.

Opinion by DENSON, J.

WEAKLEY, C. J., and HARALSON and DOWDELL, JJ., concur.

# HANEY V. THE STATE.

*Abusive and Insulting Language.*

(Decided Dec. 5th, 1906. 42 South. 683.)

APPEAL from Cleburne County Court.

Heard before Hon. T. A. JOHNSON.

BURTON & McMAHAN, for appellant.

MASSEY WILSON, Attorney General, for appellee.

Affirmed.

WEAKLEY, C. J., HARALSON and DENSON, JJ., concur.

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LOUISVILLE & NASHVILLE R. R. CO. V.  
MULDER.

*Action for Damages to Passenger.*

(Decided Nov. 22, 1906. 42 South. 743.)

APPEAL from Elmore Circuit Court.

Heard before Hon. S. L. BREWER.

GEORGE W. JONES, H. L. GOLSON, and S. LAMAR  
FIELDS, for appellant.

LULL & TATE, for appellee.

Affirmed.

Opinion by SIMPSON, J.

TYSON, C. J., HARALSON, and DENSON, JJ., concur.

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MAYOR, ETC. of ENSLEY V. GOSWICK.

*Violation of City Ordinance.*

(Decided Jan. 15th, 1907. 42 South. 829.)

APPEAL from Jefferson Criminal Court.

Heard before Hon. M. M. BALDWIN.

ROMAINE BOYD, for appellant.

A. LEO OBERDORFER, for appellee.

Reversed and remanded upon authority of *Ensley v.*  
*Cohen, infra.*

Opinion by ANDERSON, J.

TYSON, C. J., DOWDELL and McCLELLAN, JJ., con-  
cur.

ALLEN, ET. AL. V. PIERCE & CO.

*Assumpsit.*

(Decided December 20th, 1906. 42 South. 858.)

APPEAL from Montgomery City Court.

Heard before Hon. A. D. SAYRE.

MARKS & SAYRE, for appellants.

GUNTER & GUNTER, and F. S. BALL, for appellee.

Affirmed.

Opinion by SIMPSON, J.

TYSON, C. J., DOWDELL and McCLELLAN, JJ., concur.

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## ACCOUNTS.

### 1. Verified.

*Account; Action on; Verified Account; Affidavits Taken in Other States; Authentication.*—Under Section 1799, on account verified by affidavit taken before a notary in another State, to which affidavit is attached the seal of office of such notary, is sufficient authentication, and not objectionable, that a notary without the State, cannot administer an oath unless authorized to do so by the law of the State of his residence.—*Owensboro Wagon Co. v. Hall*, 210.

## ACTIONS.

See various causes of action for complaints and defenses therein.

### 1. Misjoinder of Causes.

*Actions; Misjoinder; Tort and Contract.*—A complaint containing two counts, one for deceit in the sale of goods, and one for a breach of warranty of soundness made on the sale of the goods, is demurrable for a misjoinder of the counts; the first count being case, and the other assumpsit.—*Brooks v. Romano*, 300.

### 2. Single Cause stated.

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### 3. Parties Plaintiff.

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*Same; Right to Sue in Name of Another.*—The beneficial owner of a chose in action, or property, has the right to use the name of the person holding the legal title, in a suit to recover the money or property, upon indemnifying the holder of the legal title against costs, and the owner of the legal title has no right to dismiss a suit so brought.—*Ib.* 640.

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*Same.*—Party holding the legal title to the chose in action whose name is used as the party plaintiff by the person having the beneficial interest therein, has the right to be heard on the question of fact as to whether the beneficial interest is in the party who claims it.—*Id.* 640.

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- 1903 p. 615. City Council of Montgomery v. Reese, 188.
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**ADVERSE POSSESSION.**

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1. Character.

*Adverse Possession; Character of Possession; By Donee.*—One holding land under a parol gift is a tenant at will, until there has been such adverse possession by him that, if continued for the statutory period will work a divestiture of the donor's title.—*Gillespie, et al. v. Gillispie*, 184.

*Same; Claim of Right.*—To be adverse to the donor, the possession of land by one who enters under a parol gift must be accompanied by a claim of right and hostility to the donor's title.—*Id.* 184.

*Same; Evidence; Sufficiency.*—The evidence in this case considered and held insufficient to show that the possession of the donee was adverse to the donor's title.—*Id.* 184.

2. Color of Title.

*Adverse Possession; Color of Title; What Constitutes; Possession of Part; Claim to Whole.*—In order to constitute a deed color of title, the grantee must have taken possession of a part of the land therein described, claiming title thereunder to the whole.—*Henry v. Frolichstein*, 330.

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*Agriculture; Liens; Contract of Hire; Crops.*—Where one party furnishes the land and teams and the other party the labor with an agreement to divide the crops between them a contract of hire exists under Section 2712, Code 1896, and the title of the crops are in the owner of the soil, while the laborer has his lien for his share of the crops.—*Farrow v. Wooley & Jordan*, 373.

## APPEAL AND ERROR.

See Trial.

## 1. Matters not presented in Lower Court.

*Criminal Law; Appeal; Matter not Presented in Lower Court.*—The minute entry showed that the grand jury was composed of fifteen persons, but names only fourteen. The defendant in the lower court moved to quash the venire on the grounds other than want of sufficient number of grand jurors. Held, that the objections for want of proper number of grand jurors cannot be raised for the first time in the appellate court, and that the appellate court will presume that the grand jury was legally constituted.—*Logan v. The State*, 11.

*Appeal; Submission of Cause; Objections to Evidence.*—The cause submitted for final decree on pleadings and evidence as noted by the register, and the note of submission was silent as to any objection to evidence, and it not otherwise appearing that any objections were made on the hearing of the cause, questions raised on appeal on objection to evidence may be disregarded, as raised for the first time on appeal.—*Harper v. T. N. Hayes Co. et al.*, 174.

*Appeal; Objection to Introduction of Evidence in Trial Court; Sufficiency.*—One desiring to take advantage of the provisions of Section 1531, Code 1896, should object to the introduction of the deeds because not corresponding with the abstract furnished, and cannot present the error on appeal in the absence of such objection.—*Henry v. Frolichstein*, 330.

*Appeal; Taking Objection in Trial Court; Necessity of Showing Same in Bill of Exceptions.*—This court will not review, on appeal, objections to the introduction of evidence, in the absence of a showing in the bill of exceptions that objection was offered to it in the trial court, and exception reserved to the court's action.—*Id.* 330.

*Appeal; Proceeding in Lower Court; Scope of Issues on New Trial; Theory of Action.*—The fact that a case was tried upon a different theory on a former hearing, did not deprive plaintiff of the right to prove anything material to the controversy on the present trial, where the property sought to be recovered was in possession of the defendant at the time of the institution of the suit, and was afterwards sold by his employee.—*Farrow v. Woolley & Jordan*, 373.

## 2. New Trial.

*Same; Appeal; Motion for New Trial; Review.*—This court cannot review the action of the trial court on a motion for a new trial in a criminal case.—*Ferguson v. The State*, 21.

*Appeal; Review; Refusal of New Trial; Weight of Evidence.*—The refusal of the trial court to grant a new trial, motion for which is based on the ground that the verdict was against the evidence, will not be disturbed on appeal, where there is evidence tending to support the verdict.—*Southern C. & C. Co. v. Swinney*, 403.

*New Trial; Grounds; Surprise.*—One cannot claim surprise as a ground for a new trial, based on the testimony of the officer of the corporation that such person made certain admissions, where such person denied making any admission while testifying in his own behalf on redirect examination; the remedy of a party taken by surprise at the testimony of witness of the adverse party, is by motion for a continuance.—*Geter v. Central Coal Co.*, 578.

APPEAL AND ERROR—*Continued.*

*Same; Newly Discovered Testimony; Cumulative Testimony.*—A new trial will not be granted on the ground of newly discovered testimony which is merely cumulative.—*Ib.* 578.

*Appeal; Review; Granting New Trial.*—Unless the evidence plainly supports the verdict, the granting of a new trial for insufficient evidence will not be reviewed.—*Hervey, et al. v. Hart*, 604.

*New Trial; Surprise and Mistake.*—Facts examined and stated, and it is held that under them plaintiff was properly granted a new trial on account of mistake and surprise.—*So. Ry. Co. v. Dickens*, 651.

3. Questions Presented for Review.

*Criminal Law; Appeal; Questions Presented for Review.*—In the absence of a recital in the record proper of the court's action on the demurrers, the statement in the bill of exceptions that the court overruled the demurrers does not present such action for review.—*Gains v. The State*, 29.

*Same; Reserving Exceptions to Charges.*—The bill of exceptions recites that appellant requested four charges and sets them out, and then recites that the defendant duly excepted to the refusal of the court to give them. Held, a request in bulk and not available if any one charge is bad.—*Ib.* 29.

*Criminal Law; Appeal; Review; Motion to Quash Venre.*—Although the bill of exceptions recites that a motion to quash the venre was overruled by the trial court, it does not present that question for review, on appeal, in the absence of an entry in the judgment showing the court's ruling on the motion.—*Thompson v. The State*, 37.

*Appeal; Review; Scope.*—The cause not being triable on its merits until the plea of want of jurisdiction is disposed of, the other assignments will not be considered.—*Eagle Iron Co. v. Malone*, 367.

*Appeal; Ruling on Demurrer; Review.*—On appeal, this court will not consider the sufficiency of the complaint on a ground not presented by the demurrer.—*Ala. Steel & Wire Co. v. Griffin*, 423.

*Appeal; Exceptions to Instruction; Review.*—Although the bill of exceptions does not recite that the refused instructions was separately requested, yet if each charge shows that it was separately considered and marked refused, the ruling on each instruction is revisable.—*Ib.* 423.

*Appeal; Instructions; Review.*—Instructions relating to counts open to demurrer, and so held on this appeal, will not be considered.—*Ib.* 423.

*Appeal; Rulings on Demurrer; Review.*—Where the record shows the granting of a motion to strike out parts of a complaint, but does not show what parts were stricken, nor whether the complaint as shown by the record was the same as when the demurrer was sustained to it, this court cannot review the ruling on demurrer.—*Wolf v. Smith*, 457.

*Same; Instructions; Objections; Exceptions; Necessity for.*—Objection to the oral charge must be made and exceptions reserved thereto at the time of its delivery in order to make such objections the basis for a new trial and have the same considered on appeal from the overruling of such motion.—*Geter v. Central Coal Co.*, 578.

APPEAL AND ERROR—*Continued.*

*Same; Improper Remarks of Court.*—An objection to an improper remark made by the court during the trial must be reserved by an exception thereto at the time of its making and the same made a ground for motion for a new trial, before it can be considered on an appeal from a judgment refusing a motion for a new trial.—*Id.* 578.

## 4. Presumptions on.

*Criminal Law; Appeal; Presumption.*—Where it appeared that the railroad was being operated by a street railway company, and there was no affirmative evidence to the contrary, it will be presumed on appeal that the road was a street railway, and that the prosecution under the statute, was not within the terms of the statute.—*Dean v. The State*, 34.

*Appeal; Equity; Chancellor's Decree; Presumptions.*—No presumptions are indulged as to the correctness of the chancellor's decree on appeal, and this court must reach its own conclusions without regard to such decree.—*Spears v. Taylor, et al.*, 180.

*Appeal; Review; Presumption.*—Where the bill of exceptions shows that leave was granted plaintiff to amend his complaint so as to claim damages for a rupture, though the record does not show that the pleadings were in fact so amended, it will be presumed that the amendment was made to sustain the action of the trial court in admitting evidence on this point.—*So. Ry. Co. v. McGowan*, 440.

*Appeal; Presumptions; Overruling Demurrer.*—It cannot be presumed that pleading would have been amended had demurrer been sustained thereto, hence it is not harmless error to overrule a demurrer which states that the pleading merely states a conclusion.—*Western U. Tel. Co. v. Heathcoat*, 623.

## 5. Effect of Affirmance in Criminal Cases.

*Criminal Law; Appeal; Disposition of Cause; Affirmance.*—Section 4334, Code 1896, applies only to cases in which capital punishment is imposed, and the date fixed expires before the determination of the appeal; and where the defendant is convicted of a misdemeanor and appeals, giving bail, as provided by section 4321 of the Code, the supreme court, on affirmance of the appeal, need not resentence, nor fix the date for the beginning of the sentence, the undertaking by the defendant being to surrender herself to begin the sentence upon such an affirmance.—*Weinard v. The State*, 57.

## 6. Discretion of Court.

*Appeal; Review; Discretion.*—Whether the court will permit a demurrer to be interposed to a plea after the cause is submitted to the jury, is addressed to its discretion, and not reviewable on appeal.—*Owensboro Wagon Co. v. Hall*, 210.

*Appeal and Error; Trial Court's Discretion.*—The action of the presiding judge whether he certifies or refused to certify under the provisions of Section 1326 of the Code, so as to fix the amount of costs on plaintiff in excess of the amount of judgment or not, is not reviewable on appeal; nor can the action of the judge, as to such matter, be controlled by mandamus.—*Buford v. Christian*, 343.

*Appeal; Review; Discretion; Competency of Immature Witness.*—Unless it clearly appears that the court's discretion was improperly used in permitting a witness of immature years to



APPEAL AND ERROR—*Continued.*

testify, it will not be reviewed on appeal.—*Birmingham Ry. L. & P. Co. v. Wise*, 492.

7. Harmless Error.

*Appeal; Harmless Error.*—Evidence that defendant was about 76 years of age, although immaterial, was harmless.—*Oicensboro Wagon Co. v. Hall*, 210.

*Appeal; Harmless Error; Instructions.*—As a general rule, the giving or refusing of abstract or argumentative instructions, will not work a reversal of the cause.—*Ib.* 210.

*Appeal; Prejudicial Error; Exclusion of Evidence.*—It was not error to exclude the testimony offered by plaintiff where the same failed to make out a prima facie case for him under the pleading.—*Patt v. Gerst*, 287.

*Appeal; Harmless Error; Pleading.*—Any error in striking special pleas is rendered harmless where the matters set up therein were admitted under the general issue.—*Buford v. Christian*, 343.

*Same; Admission of Evidence.*—Defendant was not prejudiced by the admission of evidence as to his acts on the land after the commencement of the suit where the recovery was for nominal damages only.—*Ib.* 343.

*Same; Failure to Present Question Below.*—Where instructions, if misleading, could have been cured by requested instructions in the court below, but no such request was made, it was harmless error to give them.—*Ib.* 343.

*Appeal; Harmless Error; Admission of Evidence.*—While it was error to allow parol testimony as to plaintiff's ownership of the land, such error is rendered harmless where documentary evidence of plaintiff's title is subsequently introduced by defendant.—*Tutwiler C. C. & I. Co. v. Wheeler*, 354.

*Appeal; Harmless Error; Instruction.*—It is not reversible error to give a charge correctly stating the law, though such charge be abstract or argumentative.—*Southern C. & C. Co. v. Sweeney*, 403.

*Appeal; Rulings on Pleadings; Harmless Error.*—Counsel for plaintiff having stated that plaintiff did not claim a recovery on any of the counts of the complaint, except certain specified ones, and the court in its charge to the jury having limited the right of recovery to the specified counts, the complaint was in effect amended by striking out the abandoned counts and rulings on demurrer to those counts, if error, was harmless.—*Ala. Steel & Wire Co. v. Griffin*, 423.

*Appeal; Harmless Error; Ruling on Demurrer.*—Defendant filed a plea of contributory negligence alleging that plaintiff negligently placed his foot on the railroad track immediately in front of a locomotive operated thereon, and thereby sustained the injury complained of. A second plea of contributory negligence averred that his foot was on the track of the road. A demurrer was sustained to the second plea. Held, the defendant was entitled under the first plea to prove the defense set up by the second plea, and the sustaining of the demurrer thereto was harmless.—*Crcola Lumber Co. v. Mills*, 474.

*Appeal; Review; Harmless Error.*—If it was error to exclude an answer of a witness, this error was cured by the subsequent admission of testimony substantially covering the testimony excluded.—*Birmingham Ry. L. & P. Co. v. King*, 504.

APPEAL AND ERROR—*Continued.*

*Appeal; Harmless Error.*—The jury having found for the defendant it was error without injury to instruct that if defendant was not grossly at fault the jury would be justified in assessing the damages as low as one dollar; although under sections 26 and 27, Code 1896, the jury might assess such damages as to them might seem just though the negligence was not gross.—*Loveman v. Birmingham Ry. L. & P. Co.*, 515.

*Same; Instructions.*—The trial court will not be reversed for giving instruction asserting no proposition of law.—*Ib.* 515.

*Appeal; Exclusion of Evidence; Prejudice.*—Where witnesses had testified to the locality and its surroundings, and as to the houses etc., there about the plaintiff was not prejudiced by being prevented from proving that there was a village there.—*Johnson v. Birmingham Ry. L. & P. Co.*, 529.

*Appeal; Harmless Error; Demurrer.*—Where plaintiff had the benefit under two other counts of all the evidence that could have been offered to the counts to which the demurrer was sustained, the sustaining of the demurrer was harmless.—*Bradley v. L. & N. R. Co.*, 545.

*Appeal; Review; Harmless Error; Instruction.*—Where the general charge is properly given for defendant, the refusal to give charges requested by plaintiff asserting correct legal propositions is harmless error.—*Farley v. Mobile & O. R. R. Co.*, 557.

*Appeal; Evidence; Harmless Error.*—When a witness gives in detail evidence fully answering a question it is harmless error to sustain an objection to such question.—*So. Ry. Co. v. Cofer*, 565.

*Same.*—A witness was allowed to detail the fact concerning the conditions "alongside" the press at the time inquired about, and it was harmless error to exclude a question as to whether it was possible to get alongside the compress with freight at a certain time.—*Ib.* 565.

*Same; Numbering Charges.*—While it is not fatal, on appeal, to fail to number requested written instructions, it should be avoided where the charges are numerous.—*Ib.* 565.

## 8. Assignment of Error.

*Appeal; Assignments of Error; Sufficiency.*—The portion of the judge's charge containing several hundred words and many sentences is set out in the bill of exceptions. The assignment of error does not point out particularly the defective portions, and counsel do not do so in brief. Held, the exception is unavailing unless all the portion set out is bad.—*Ala. Steel & Wire Co. v. Griffin*, 423.

*Appeal; Assignment of Error; Record; Review.*—Where the appeal is taken from the overruling of a motion for a new trial assignments of error predicated on exceptions reserved on the trial, not made ground of motion for new trial, cannot be considered on appeal.—*Geter v. Central Coal Co.*, 579.

## ASSUMPTION OF RISK.

See Master and Servant, Railroads, Street Railways, Negligence.

## ATTACHMENT.

## 1. Claim Suit.

*Attachment; Claim Suit; Amendment of Affidavit.*—Where an affidavit in a claim suit states that the property attached is not

**ATTACHMENT—Continued.**

the property of the attachment debtor, but is the property of the claimant, without stating the nature of the right or claim set up, such an affidavit is sufficient to give the court jurisdiction of the claim suit and to authorize an amendment setting forth the nature of the right or claim of claimant to the property.—*Witherington v. Gainer*, 655.

**ATTORNEY AND CLIENT.**

See Trial, Conduct of Counsel.

*Attorney and Client; Duty to Client; Acting for Adverse Party.*—

Where the defendant's attorney is authorized in writing by plaintiff to have a cause dismissed, and made such motion under such authority, it is not a representation of both parties by him.—*Ex parte Randall*, 640.

*Same; Settlement by Client.*—A party has a right to make any settlement or compromise he pleases with the other party and to order a dismissal of the suit, if he be plaintiff, whether he has employed counsel or not.—*Ib.* 640.

**BANKRUPTCY.**

*Bankruptcy; Fraudulent Transfer; Action to Set Aside.*—The bill averred that a certain mortgage was fraudulently given and that the said mortgage had been fully paid on and discharged before the filing of the bill. Held, a bill to declare a fraudulent preference was not maintainable as a bill to set aside a fraudulent conveyance or transfer under section 818, Code 1896, as the mortgage was functus officio.—*Brock & Spight, et al. v. Oliver*, 93.

*Bankruptcy; Pleading Discharged; Avoidance.*—A plea setting up a discharge in bankruptcy as a bar is properly met by an amendment alleging that the lien under the judgment sought to be enforced was acquired more than four months before the filing of the bankruptcy petition.—*Brunson, et al. v. Rosenheim & Son*, 112.

*Bankruptcy; Discharge; New Promise; Action; Evidence.*—In an action on a new promise to pay a discharge debt, an inquiry as to defendant's earnings two years subsequent to the commencement of the suit, was not proper.—*Torry v. Krauss*, 200.

*Same; Income of Debtor; Use of.*—A debtor, liable on a new promise to pay a debt discharged as soon as he is able, is not required to gauge his expenditures for the support of himself and family so as to enable him to meet the obligation. *Ib.* 200.

*Bankruptcy; Discharge; New Promise.*—A clear, distinct, unequivocal promise to pay a debt discharged, made after promisor has been adjudged a bankrupt, will support an action at law.—*Ib.* 200.

*Same; Pleading.*—Under a promise to pay a discharged debt by the bankrupt, the creditor may proceed upon the promise, or may sue on the original debt, and reply the new promise to a plea of the discharge in bankruptcy.—*Ib.* 200.

*Same; New Promise; Definiteness.*—A promise to pay a debt discharged as soon as he is able binds the debtor, and is not void for uncertainty.—*Ib.* 200.

*Same; Action on Promise; Evidence.*—In an action on a new promise to pay a discharged debt it is necessary to allege and prove defendant's ability to pay, where the promise was

**BANKRUPTCY—Continued.**

that he would pay as soon as able; and proof of ability to borrow money is not sufficient.—*Ib.* 200.

*Same.*—Where the evidence did not disclose that the promisor had property other than his salary, which was necessary, undisputedly, to support his family, he was entitled to a direction of the verdict, and it was not prejudicial error to exclude evidence of his ability to borrow money.—*Ib.* 200.

**BROKERS.**

*Brokers; Right to Compensation; Contract of Employment; Performance.*—It is not necessary that there should be an actual purchase of the property upon which options have been obtained, before the broker, who undertakes to obtain options on certain property for another, is entitled to his compensation therefor.—*Worthington v. McGarry*, 251.

*Same; Rules of Construction; Language of Instrument; Intent of Parties.*—Where the contract stipulated that if the broker obtained the option at a price at which the purchaser may buy, it was the intention of the parties, and the meaning of the contract, that the option should be obtained at a price which was satisfactory to the purchaser, and the conditions of the contract were fully complied with when it was shown that the price was satisfactory to the prospective purchaser.—*Ib.* 251.

*Same; Failure to Perform; Direction of Principal.*—The parties to the contract agree that defendant would pay plaintiff a sum certain if the plaintiff would secure for defendant options on certain ore lands and on a majority of the stock of a named corporation. Plaintiff secured the ore land option at a price satisfactory to the defendant, but did not secure options on the stock of the corporation, but alleged and proved that he was prevented from doing so by the defendant. Held, Plaintiff is not entitled to compensation under the contract for securing the options on the ore lands.—*Ib.* 251.

*Same; Breach; Rights and Liabilities on Partial Performance.*—The broker has an action in damages for a breach of the contract, where the other party to the contract agrees to give him certain compensation to secure certain options, and afterwards direct him not to secure a part of said options.—*Ib.* 251.

*Brokers; Action for Compensation; Complaint; Sufficiency.*—Where the complaint alleged that defendant employed plaintiff to obtain for him a purchaser for a certain piece of property, agreeing with plaintiff to pay him all above a certain sum over the purchaser's price for his service, it contains a sufficient averment of the employment of plaintiff.—*Stevens v. Bailey & Howard*, 256.

*Same.*—A complaint alleging that defendant authorized plaintiff to sell defendant's property on specified terms, and that plaintiff fully complied with the same, and that when it was reported to defendant he approved and accepted the offer of the purchaser, and that the purchaser was able and willing to pay for the property, but that defendant refused to consummate the trade, sufficiently shows an employment of plaintiff.—*Ib.* 256.

*Same; Defenses; Statute of Frauds.*—It is no defense to an action to recover commission or compensation for the sale of land that the contract with the broker was within the statute of frauds.—*Ib.* 256.

**BROKERS—Continued.**

*Same.*—The evidence in this case considered, and it is held that the question of plaintiff's employment was one for the jury.—*Id.* 256.

*Same; Employment.*—When a real estate broker asks and obtains a certain price for real estate from the owner, that, without more, does not establish the relation of principal and agent, nor show a contract of employment.—*Id.* 256.

**CARRIERS—PASSENGERS.**

See Railroads, Street Railways.

**1. Who are Passengers.**

*Same; Instructions; Who are Passengers.*—An instruction defining a passenger "as one who is boarding a car, or attempting to board a car, or at the station of a company operating a car for the purpose of being carried on the car from one point to another" and the further statement therein that "he becomes a passenger, when, with the intention of boarding a train, he attempts to board for the purpose of riding," is erroneous, in premitting all enquiry of acceptance as such by the carrier.—*Ala. City G. & A. Ry. Co. v. Bates*, 487.

**2. Injuries to Passengers.****(a) Evidence.**

*Carriers; Injury to Passengers; Evidence; Burden of Proof.*—The burden is on the plaintiff to show that he was a passenger, in an action for injuries alleged to have occurred while plaintiff was boarding one of defendant's cars, at a regular stopping place for the reception of passengers.—*Ala. City G. & A. Ry. Co. v. Bates*, 487.

**(b) Complaint.**

*Carriers; Existence of Relation of Passenger and Carrier; Pleading.*—A complaint containing allegations that defendant was a common carrier of passengers by means of electric cars running from G. to B.; that plaintiff and her children were at G. at the proper place there for receiving passengers, for the purpose of being transported by means of such car from G. to B.; that the car stopped at said place for the purpose of receiving passengers, but plaintiff did not board it by reason of the negligence of the servant of defendant in charge of the car in negligently failing to allow her a reasonable time or opportunity to do so, aside from the positive allegations therein contained that plaintiff and her children were defendant's passengers, and that it was its duty to transport them from G. to B., sufficiently shows the relation of carrier and passenger.—*Birmingham Ry. L. & P. Co. v. Wise*, 492.

*Same; Wanton Injury; Pleading.*—A complaint, after alleging that the servant of defendant in charge of the car negligently failed to allow plaintiff a reasonable time or opportunity to board the car, averred that defendant's servant in charge of the car, while acting in the line and scope of his authority as such servant, wantonly or intentionally prevented plaintiff from boarding said car as aforesaid, and thereby wantonly or intentionally caused said plaintiff to suffer said injuries. Held, sufficient to charge wantonness or intentional injury.—*Id.* 492.

*Carriers; Injury to Passenger; Complaint; Sufficiency.*—A complaint which alleges that the defendant was a common carrier

CARRIERS—PASSENGERS—*Continued.*

operating an electric car line, and that plaintiff was a passenger thereon for hire, that on reaching the station the car stopped and while plaintiff was in the act of alighting the car moved off suddenly throwing plaintiff to the ground and severely injuring him, and that said injuries were proximately caused by the negligence of the defendant's employe in charge of the car, in the management thereof, is not subject to demurrer as being vague and uncertain, and not stating facts showing negligence of defendant's employe, or in what they were negligent, or that they were negligent in the line of their employment. Count two charging the negligence to the motorman in the operation of the car and count three charging negligence to the conductor, on the same allegations of facts as count one, are neither subject to such demurrer.—*Birmingham Ry. L. & P. Co. v. King*, 504.

## (c) Instructions.

*Carriers; Injury to Passengers; Instructions; Sudden Danger.*—

An instruction asserting that "one brought into sudden danger by the wrong of another is not expected to act with coolness and deliberation as would a reasonable man under ordinary circumstances," is erroneous in predicated, as matter of law, lack of coolness upon merely sudden danger, however slight, as distinguished from extreme danger.—*Ala. City G. & A. Ry. Co. v. Bates*, 487.

*Carriers; Injury to Passengers; Instructions.*—

The court instructed the jury that if the car was suddenly jerked forward while plaintiff was alighting, she could recover, unless guilty of contributory negligence. The court modified this charge by instructions to the jury that the defendant did not owe plaintiff the absolute duty to deliver him safely that they were not insurers—absolute insurers—of the safety of passengers, but they owed the passengers the highest degree of care to deliver them safely. As modified, the instruction was correct.—*Birmingham Ry. L. & P. Co. v. King*, 504.

## 3. Ejection of Passengers.

*Carriers; Ejection of Passengers; Complaint; Sufficiency.*—

The complaint was not demurrable, although plaintiff was not entitled to recover for a wrongful ejection, as he had a right of action for a breach of the contract to carry, or for defendant's negligence in not issuing proper transfer.—*Montgomery Traction Co. v. Fitzpatrick*, 511.

*Same; Designation of Servant.*—

A complaint alleging that owing to the negligence of the conductor in issuing the transfer, plaintiff, a passenger, upon tending such transfer to a conductor on another of defendant's cars, was ejected therefrom by the conductor thereof, sufficiently designates the servant or conductor, without naming him.—*Id.* 511.

## 4. Loss of Goods.

## (a) Evidence.

*Carriers; Loss or Conversion of Goods; Jury Question.*—

Whether or not plaintiff paid the freight upon the goods, held, under the evidence in this case, a question for the jury.—*L. & N. R. R. Co. v. Britton*, 552.

*Same; Admissibility of Evidence.*—

It was permissible to show by a witness that defendant's claim agent showed him a box

**CARRIERS—PASSENGERS—Continued.**

of slippers and told them they were plaintiffs and offered to sell them to witness, as tending to show that defendant was in possession of the property and exercising acts of ownership over it; it having been shown that such agent was in charge of the claim department of defendant company.—*Ib.* 552.

(b) Refusal to Deliver.

*Carriers; Loss of Goods; Unqualified Refusal to Deliver.*—A carrier may require the production of the bill of lading before consenting to deliver goods. This is a qualified refusal. But a general or unqualified refusal may be shown as evidence of a conversion. But whether qualified or unqualified, held, under the evidence in this case, a question for the jury.—*L. & N. R. R. Co. v. Britton*, 552.

(c) Delay in Delivery.

*Carriers; Delay in Delivery; Damages; Instructions.*—It was error to instruct that the damages for delay in delivery of the cotton should be estimated at the price of the cotton at the place of delivery, when the bill of lading provided that the amount of damages for which the carrier should be liable should be computed at the value of the cotton at the time and place of shipment.—*So. Ry. Co. v. Cofer*, 565.

*Same; Evidence; Competency.*—Where the bill of lading bound the railroad only to transport with as reasonable dispatch as its general business would permit, and one of its pleas was that an unprecedented amount of freight prevented its handling the cotton more expeditiously, it was competent to show that a subsequent shipment reached the same destination prior to the first shipment, as to the delay and in refutation of the plea.—*Ib.* 565.

*Same; Notice of Arrival.*—In view of the provisions of Section 4224, Code 1896, it was competent to show, in an action for damages for delay in delivery of goods, that the railroad failed to give the consignee notice of the arrival of the goods until a certain date, as tending to show that the goods did not arrive until at or about that date.—*Ib.* 565.

**CHARGE OF COURT.**

See Trial, Subt. Instructions.

For charges in particular actions or crimes see appropriate title, Subt. Instructions.

*Trial; Instructions; Construction.*—In passing upon the oral charge of the court, where portions thereof are excepted to, the charge must be construed as a whole.—*Birmingham Ry. L. & P. Co. v. King*, 504.

**CHATTEL MORTGAGES.**

See Mortgages.

1. Rights of Mortgagee before Maturity.

*Chattel Mortgage; Right of Mortgagee before Maturity; Trover and Trespass.*—A chattel mortgagee cannot maintain an action for conversion or for trespass against the mortgage property, by a third person, before maturity of the mortgage where he has no right of possession to the property before default in the mortgage.—*Wilson & Son. v. Curry*, 368.

CHATTEL MORTGAGES—*Continued.*

*Same.*—The equity of a chattel mortgagor being subject to execution or attachment, and the officer having an exclusive right of possession and the right to remove the property from the debtor's premises, the plaintiff in execution or attachment cannot be made liable for trespass or trover in taking the property under either process.—*Id.* 368.

## CODE SECTIONS CITED AND CONSTRUED.

*Sections.*

11. Foster v. State, ex rel. Standford, et al., 632.
- 26-27. Loveman v. Birmingham Ry. L. & P. Co., 515.
28. Ex parte Randall, 640.
133. Gillispie, et al. v. Campbell, 193.
138. Loveman v. Birmingham Ry. L. & P. Co., 515.
189. Wilson & Son v. Curry, 368.
227. Howard, et al. v. Rutherford, 661.
239. Howard, et al. v. Rutherford, 661.
676. City Loan & Banking Co. v. Poole, 164.
701. Brunson, et al. v. Rosenheim & Son, 112.
786. Babcock v. Reeves, et al. 665.
788. Babcock v. Reeves, et al., 665.
809. Kinney v. Steiner Bros., 104.
811. Kinney v. Steiner Bros., 104.
812. Kinney v. Steiner Bros., 104.
818. Brock & Spight v. Oliver, 93.
918. Clarke v. Jernigan, 365.
922. Norwood v. L. & N. R. Co., 151.
1326. Clarke v. Jernigan, 365.
1326. Buford v. Christian, 343.
1531. Henry v. Frollichstein, 330.
1555. Henry v. Davis, 359.
1749. Subd. 5, Ala. Steel & Wire Co. v. Griffin, 423.
1749. Subd. 5, Creola Lumber Co. v. Mills, 474.
1749. Subd. 2-3, Creola Lumber Co. v. Mills, 474.
1799. Owensboro Wagon Co. v. Hall, 210.
1804. Owensboro Wagon Co. v. Hall, 210.
1806. Norton v. Clayton Hdw. Co., 248.
1906. Owensboro Wagon Co. v. Hall, 210.
2077. Harper v. T. N. Hayes Co., et al., 174.
2152. City Loan & B. Co. v. Poole, 164.
2529. Maxwell v. Herzfield, et al., 67.
2647. Alabama City G. & A. Ry. Co. v. Ventress, 658.
2648. Ala. City G. & A. Ry. Co. v. Ventress, 658.
2649. Alabama City G. & A. Ry. Co. v. Ventress, 658.
2651. Alabama City G. & A. Ry. Co. v. Ventress, 658.
2652. Alabama City G. & A. Ry. Co. v. Ventress, 658.
2662. Clarke v. Jernigan, 365.
2703. Wilson & Son v. Curry, 368.
2704. Wilson & Son v. Curry, 368.
2705. Wilson & Son v. Curry, 368.
2706. Wilson & Son v. Curry, 368.
2706. Farrow v. Wooley & Jordan, 373.
2712. Farrow v. Wooley & Jordan, 373.
2811. Courtner v. Etheridge, et al., 78.
2917. Wolf v. Smith, 457.
3304. Abraham Bros. v. Southern Ry. Co., 547.
3327. Nelson v. The State, 26.



CODE—*Continued.*

*Sections.*

- 3331. Henry v. Frolchstein, 330.
- 3456. Dean v. The State, 34.
- 3480. C. of Ga. Ry. Co. v. Sturgis, 573.
- 4069. Pickler v. The State, 669.
- 4141. Farrow v. Wooley & Jordan, 373.
- 4145. Witherington v. Gainer, 655.
- 4207. Abraham Bros. v. So. Ry. Co., 547.
- 4224. Abraham Bros. v. So. Ry. Co., 547.
- 4321. Weinard v. The State, 57.
- 4334. Weinard v. The State, 57.
- 4461. Bradford v. The State, 1.
- 4462. Bradford v. The State, 1.
- 4532. Weinard v. The State, 57.
- 4532. Moore v. The State, 66.
- 4636. Jones v. The State, 63.
- 4707. Bradford v. The State, 1.
- 4710. Bradford v. The State, 1.
- 5077. Dinkins v. The State, 49.
- 5306. Bradford v. The State, 1.
- 5368. Dean v. The State, 34.
- 5414. Bradford v. The State, 1.
- 5423. Perry v. The State, 40.
- 5424. Perry v. The State, 40.
- 5425. Perry v. The State, 40.
- 5620. Perry v. The State, 40.

COMPOSITION.

*Compromise and Settlement; Composition in Writing.*—A creditor wrote his debtor offering, after being forced into bankruptcy, fifteen per cent in full settlement of his claim, which offer was accepted, the creditor instructing the bank, to whom the claim had been sent, to receive fifteen per cent in settlement; and the debtor sending check to the bank for that amount, the bank collected check, and marked claim paid. Held, that it was a composition of the debt in writing, and binding under Section 1806, Code 1896.—*Norton v. Clayton Hardware Co.*, 248.

*Same; Fraudulent Representations.*—The debtor wrote a creditor offering fifteen per cent in full settlement of the claim, stating that he was making same offer to all his creditors, which was a fact. The creditor accepted the offer. Held, a valid composition with that creditor, although some creditors insisted on a larger dividend and got it.—*Ib.* 248.

CONSPIRACY.

See Homicide, subd. Evidence.

1. What Subject of.

*Homicide; Manslaughter; Conspiracy to Commit.*—Parties may enter into conspiracy to commit manslaughter.—*Ferguson v. The State*, 21.

CONSTITUTIONAL LAW.

See Statutes.

1. Impairing Obligation of Contracts.

*Constitutional Law; Impairing Obligation of Contracts.*—The Act of March 2, 1901, (Acts 1900-01, p. 2070) affords a remedy for

CONSTITUTIONAL LAW—*Continued.*

the enforcement of the contract instead of destroying or impairing the remedy, and hence is not violative of article 4, section 56, Constitution 1875.—*Courtner v. Etheridge, et al.*, 78.

CONSTITUTIONAL LAW—SECTIONS CITED AND CONSTRUED.  
Constitution 1875.*Section.*

56. *Courtner v. Etheridge, et al.*, 78.

2. *Courtner v. Etheridge, et al.*, 78.

Constitution 1901.

*Section.*

6. *Mayor and Aldermen of Birmingham v. O'Hearn*, 367.

45. *Mayor and Aldermen of Ensley v. Cohn*, 316.

104. *Mayor and Aldermen of Ensley v. Cohn*, 316.

105. *Mayor and Aldermen of Ensley v. Cohn*, 316.

105. *City Council of Montgomery v. Reese*, 188.

106. *Mayor and Aldermen of Ensley v. Cohn*, 316.

158. *Foster v. The State, ex rel. Stanford*, 632.

232. *Armour Packing Co. v. Vinegar Bend Lumber Co.*, 205.

232. *Abraham Bros. v. So. Ry. Co.*, 549.

## CONTRACTS.

See Sales.

## 1. Construction.

*Same; Construction.*—A contract that A. will not engage in the turpentine business within ten miles of a certain place so long as B. operates a still at that place, prevents A.'s engaging in the business, although B.'s turpentine still is outside the corporate limits of the town.—*Harris v. Theus, et al.*, 133.

## 2. Consideration.

*Same; Sufficiency of Consideration.*—The purchase of the turpentine business and leases by B. was a sufficient consideration for the covenant that A. would not engage in that business within ten miles of the town so long as B. remained there in business.—*Harris v. Theus, et al.*, 133.

## 3. Restraint of Trade.

*Contracts; Restraint of Trade; Legality.*—Although contracts in general restraint of trade are void as against public policy, a contract is valid and enforceable under which one sells another pine lease lands and agrees not to engage in the turpentine business within ten miles of a certain place so long as another is engaged in that business there.—*Harris v. Theus, et al.*, 133.

## 4. Compensation.

*Contract; Compensation; Extra Work.*—A person doing work known as "old grading" which was not included in his contract, but which was necessary to be done in order to complete certain work contracted to be done, is entitled to additional compensation for whatever the extra work was reasonably worth.—*Henderson-Boyd Lumber Co. v. Cook*, 226.

*Work and Labor; Contract; Substantial Performance; Quantum Meruit.*—Where a substantial part of the work under the contract had been completed and accepted, the person doing the work is entitled to recover thereon on a quantum meruit, and the other party sustaining no damage from the failure to complete, the person doing the work is entitled to the full reasonable value thereof.—*Id.* 226.

CONTRACTS—Continued.

5. Forfeiture.

*Waters; Water Supply; Contract; Forfeiture for Non-payment of Rent.*—One may not forfeit a contract for non-payment of rent, unless it is stipulated in the contract.—*Bienville W. Supply Co. v. Heironymus Bros.*, 265.

6. Assignment.

*Same; Assignment of Contract; Provisions for Personal Service.*—The contract provided that both parties should have the right to assign the same, and that the party of the first part should have nothing to do with the kiln business. It also provided that the party of the first part should turn over to the party of the second part the dry kiln and sheds and other appurtenances thereto then in operation at first parties mill, and furnish the steam to dry the lumber; the party of the second part agreed to furnish his skill and services in making the changes necessary for making more steam and in case the kiln should be destroyed, the party of the second part would give his skill and services in assisting to rebuild it. The party of the second part assigned the contract. Held, in an action by the assignee of the contract for damages because of the party of the first parts refusal to deliver the lumber, the complaint was not demurrable on the ground that the agreement contained an obligation for personal services by the assignor, and the transfer did not relieve him from performing the same. The provisions for personal service having no reference to the sale or purchase of the lumber.—*Byrne Mill Co. v. Robertson*, 273.

7. Gambling.

*Gaming Contract; Futures; Right of Broker to Recover Advances.*—A contract for the sale of cotton on margin, where neither party expects or agrees to receive or deliver the actual cotton sold or bought, is a wager contract under the common law; yet a broker, having no interest in the transaction and not sharing in the profit or loss, is entitled to be reimbursed for advances made for his principal.—*Allen, et al. v. Caldwell, Ward & Co.*, 293.

*Contracts; Legality of Objects; Conflict of Laws; What Law Governs.*—Louisiana not being of common law origin with Alabama, when a contract to be performed in Louisiana is sued on in Alabama, and proof is not made of the laws of Louisiana, the Alabama court will be governed by the statutes of Alabama, when applicable to the facts, it being impossible to apply the common law.—*Ib.* 293.

*Gaming Contract; Burden of Proof.*—One asserting that a contract is violative of the statute making contracts based on a gambling consideration void, has the burden of proving it.—*Ib.* 293.

CONTRIBUTORY NEGLIGENCE.

See Negligence, Master and Servant, Railroads, Street Railways, Carriers.

CORPORATIONS.

1. Foreign—Right to do Business Here.

*Corporations; Foreign Corporations; Right to do Business in this State.*—The State has the power to require a foreign cor-

CORPORATIONS—*Continued.*

poration doing business in this State to file with the secretary of State a certified copy of its articles of incorporation, as provided by Section 232 of the constitution of 1901.—*Armour Packing Co. of La. Ltd. v. Vinegar Bend Lumber Co.*, 205.

*Same.*—A foreign corporation which was doing business in this State at the time of the adoption of the Constitution of 1901, having complied with all the provisions of the Constitution and statutes enacted prior to that time, must, in order to continue to do business thereafter, comply with Section 232 of the constitution of 1901.—*Ib.* 205.

*Same.*—Section 232, Constitution 1901, is prohibitory and mandatory, and it is unlawful for a foreign corporation to transact business in this State without complying with its requirements, although no penalty for its violation is prescribed, and it is not declared that contracts entered into by foreign corporations without a compliance therewith are void.—*Ib.* 205.

## 2. Service of Process on.

*Corporation; Process; Service on Foreign Corporation; Constitutional and Statutory Provisions.*—The act of a foreign corporation in constituting agents, and placing them in a county, authorizing them only to solicit traffic, freight and passenger, but without authority to bind the corporation, was not an act of "doing business" in such county, and in the absence of a line of railroad in the county or the operation of trains through the County, or in the County, the courts of such county have no jurisdiction of causes against such corporations, and as to such county, such corporation is not within the purview of Section 4207, Code 1896, or Section 232 of the Constitution of 1901.—*Abraham Bros. v. So. Ry. Co.*, 547.

## COSTS.

See Municipal Corporations.

*Costs; Taxation in Actions of Tort; County Court; Statutory Provision.*—Under the act creating the county court of Coffee County (Loc. Acts, 1903, p. 399), the said court has jurisdiction concurrent with justices of the peace, and with the circuit court up to the sum of five hundred dollars, and its jurisdiction, in an action of tort for damages in the sum of thirty-five dollars, is that of a justice of the peace, and not of the circuit court, and Section 1326 of the Code of 1896 has no application to the taxing of the costs.—*Clarke v. Jernigan*, 365.

## COURTS.

See Judges.

## 1. Terms—Duration.

*Courts; Terms; Duration of Term.*—A summons was issued and served on the defendant on October 8th, returnable to the November term. The November term convened on the 7th of that month, and on Tuesday following the convening of the court, the plaintiff not having demanded trial by jury, and the defendant not appearing, a judgment by default was entered against defendant. Held, that under the terms of the act (Local Acts 1903, p. 40,) creating the county court of Geneva county, the case stood for trial and was triable on the day the judgment by default was rendered.—*Smith v. Chapman & Co.*, 191.

CRIMINAL LAW.

See Trial, See particular crimes for charges and evidence as to.

1. Sentence.

*Criminal Law; Sentence; Conformity to Charge.*—A sentence imposing punishment under Section 4710, although the conviction was had under an indictment charging the offense defined by Section 4707, being within the period of limitation as to time prescribed by section 4707, is not void or erroneous.—*Bradford v. The State*, 1.

*Same; Sentence; Sufficiency.*—The sentence in this case was that defendant perform hard labor for a period of thirty days to pay the fine, and hard labor for 352 days to pay the costs, amounting to \$105.63, and that the sentence should begin on April 11th and expire on Feb. 11th following, and not to exceed ten months. Held, such sentence was not void, although it should have been for thirty days to pay the fine, and ten months additional to pay costs. such sentence is sufficient to prevent a discharge of the defendant from a compliance therewith, and to prevent a discharge of the sureties on her bond in the event she does not surrender herself after affirmance on appeal.—*Weinard v. The State*, 57.

2. Verdict.

*Criminal Law; Verdict; Sufficiency.*—Where several are jointly indicted and tried and conviction had, a verdict assessing as a fine a single or lump sum, is invalid; the verdict should assess a fine separately against each offender.—*Perry, et al. v. The State*, 40.

3. Judgment.

*Criminal Law; Conviction; Judgment.*—Upon the conviction of the defendant and the assessment of a fine against him, unless the fine and costs are paid or judgment confessed, the judgment must show either that he was imprisoned or sentenced to hard labor. (Sections 5423-5425, Code 1896.)—*Perry, et al. v. The State*, 40.

*Criminal Law; Judgment.*—In a misdemeanor case the sentence should show an ascertainment of the costs and the determination by the court of the number of days required to work it out, at thirty cents per day, not to exceed ten months; and a sentence ordering accused to perform additional labor, not to exceed ten months, at eighty-three cents per day, until the costs are satisfied, is improper, but the court will do no more than to reverse for a resentence according to law.—*Moore v. The State*, 66.

4. Misnomer.

*Criminal Law; Misnomer; Jury Question.*—Where a plea of misnomer is interposed and the evidence on the plea is in conflict, its decision is properly submitted to the jury.—*Daniel v. The State*, 44.

5. Discontinuance.

*Criminal Law; Time of Trial; Discharge for Delay; Discontinuances.*—Petitioner was convicted and sentenced to the penitentiary on January 9th, 1905, the judgment was affirmed, but on application for rehearing, on Feb. 4th, 1905, the judgment was annulled and the cause reversed, and defendant remained in the custody of the convict department until the filing of

CRIMINAL LAW.—*Continued.*

this petition for habeas corpus on Dec. 23rd, 1905. Held, this did not entitle him to a discharge for delay in trial, nor did the fact that one entire term of the criminal court of Jefferson county passed without an order having been made in the case, entitle him to a discharge because of a discontinuance, as it appeared that at the next term a forfeiture was taken against defendant and bail and an alias capias issued for his arrest.—*Smith v. The State*, 53.

*Criminal Law; Discontinuance.*—The omission by a ministerial officer to do something it was his duty to do, or the passing of a term of court without entering an order continuing a case on the docket will not constitute such a chasm in a criminal prosecution as will work a discontinuance. A discontinuance must come from some act of the court or prosecuting officer evidencing an intention to abandon the prosecution.—*Ib.* 53.

## CUSTOM AND USAGE.

See Evidence.

*Customs; Establishment; Evidence; Jury Question.*—Where a railroad contractor sought to recover for extra items of work done outside the contract and testified that all the extra items were necessary and that with items of this kind it is the custom of railroad contractors to charge it at actual cost, plus ten per cent. this evidence afforded some proof of the custom, and as to its sufficiency, it was a question for the jury.—*Henderson-Boyd Lumber Co. v. Cook*, 226.

*Same; Evidence of Custom.*—It is competent to show by those acquainted with that class of railroad construction work what is the custom of railroad contractors doing the same class of work, as to additional compensation for such work, and the reasonable amount of such compensation.—*Ib.* 226.

*Evidence; Parol; Shipment of Goods; Place of Delivery; Custom.*—It was competent to show by parol evidence the existence of a custom to shed light upon the intention of the parties as to how the bill of lading should be understood with respect to the place of delivery, where the bill of lading for certain cotton shipped over defendant's road read "Name, G. K. Place, West Point, Va. County, care press. State, Selma, Alabama," the same being an ambiguity on the face of the bill.—*So. Ry. Co. v. Cofer*, 565.

## DAMAGES.

See Death. See appropriate title of actions for damages therein.

*Damages; Liquidated Damages and Penalty; Forfeiture on Breach.*—A contract providing that the contractor was to receive \$350 per mile for doing certain work, three hundred of which was to be paid as each mile was accepted, and the \$50.00 to be held back for each mile until the contract was completed, which was a guarantee for the completion of the work, such a stipulation was for a penalty and was not liquidated damages.—*Henderson-Boyd Lumber Co. v. Cook*, 226.

*Damages; Speculative Damages; Breach of Contract.*—Where the contract required party of the first part to deliver certain described lumber to party of the second part that might be made by party of the first part "while operating his mill on other regular orders," no damages could be recovered in an action for damages for breach of the contract to sell and

**DAMAGES—Continued.**

deliver, based on a prospective operation of the mill, such damages being entirely speculative.—*Byrne Mill Co. v. Robertson*, 273.

*Damages; Personal Injury.*—In an action for personal injury the plaintiff, if entitled to recover at all, can recover such damages as a jury think proper under the evidence not to exceed the amount claimed.—*So. Ry. Co. v. McGowan*, 440.

*Damages; Right to Punitive Damages; Instructions.*—An instruction authorizing punitive damages if the act was done negligently, intentionally or wantonly, is improper; such damages not being recoverable for simple negligence.—*Birmingham Ry. L. & P. Co. v. Wise*, 492.

*Damages; Injury to Property; Repair.*—The measure of damages in this case was not what it would actually cost to repair the wagon, but what it would reasonably cost to put the property in the same condition as it was before the injury, or the difference in value of the property before and after the injury.—*L. & N. R. Co. v. Mertz, Ibach & Co.*, 561.

*Damages; Personal Injuries; Evidence Amount of Damages.*—It was permissible to show that plaintiff, who was a physician could not care for his practice as conveniently and agreeably, and what was the average amount of his practice per month, before the injury, as an element of damage.—*Dunn & Lallande Bros. v. Gunn*, 583.

*Same; Admissibility on the Pleadings.*—The complaint not alleging damages because of loss of business, it was incompetent to show the decrease in the physician's practice, and the impairment of his ability to practice.—*Ib.* 583.

**DEATH.**

See Damages.

*Death; Right to Sue; Personal Representative.*—The personal representative of an intestate may bring an action for his wrongful death.—*Woodstock Iron Works v. Kline*, 391.

*Same; Pleadings; Complaint; Existence of Heirs.*—It is not necessary to allege or prove that intestate left any heirs at law surviving him in order to enable his personal representative to maintain suit for his wrongful death.—*Ib.* 391.

*Death; Damages; Nominal Damages.*—In the absence of distributees of decedent's estate a recovery for his wrongful death is limited to nominal damages.—*Ib.* 391.

*Same; Damages; Proof.*—Proof of deceased's earning capacity, his age, life expectancy, habits of industry, business, etc., constitute sufficient proof from which pecuniary compensation might be awarded in an action for his wrongful death.—*Ib.* 391.

*Death; Evidence; Damages.*—It was permissible to show that plaintiff's intestate and another walked from another state to the place of employment, begged food and slept in barns, as shedding light upon whether or not intestate was a sober and industrious man, or an inebriate, a tramp or a lazy man, to go to the jury in determining intestate's earning capacity, and as shedding light on the question of damages.—*Ala. Steel & Wire Co. v. Griffin*, 423.

*Measure of Damages; Evidence; Admissibility.*—It may be shown in an action for the negligent death of intestate that he was skilled in trades other than the one in which he was employed, and what he could earn at such trade, as shedding light on his

DEATH—*Continued.*

probable earning capacity, unless he had permanently abandoned the same, or had become incapacitated from following it before his death.—*Ib.* 423.

*Death; Measure of Damages.*—Where the parents of the intestate were entitled to the damages awarded for his death, their life expectancy does not enter into the estimate of the damages.—*Ib.* 423.

*Same; Jurisdiction.*—Although intestate was a non-resident and had no property in this state at the time of his death, his administrator may recover for the negligent death in the courts of this state.—*Ib.* 423.

## DEEDS.

See Logs and Logging.

## 1. Delivery.

*Deeds; Delivery to Take Effect on Grantor's Death.*—Irrespective of the place where the deed was kept, the title to the land passed at the time of delivery, where the grantor gave the deed to one of the grantee's therein with instructions to keep it in a certain box, and deliver it to the proper parties at his death.—*Strickland, et al. v. Griswold, et al.*, 325.

*Same; Jury Question.*—When the grantees in a certain deed claimed under a deed alleged to have been delivered to one of them by the grantor to be delivered to the proper parties, the question of delivery was a question for the jury to determine. (*Haralson and Simpson, JJ., dissent.*)—*Ib.* 325.

## DEPARTURE.

See Pleading.

## DISMISSAL OF CAUSE.

*Dismissal; Grounds; Absence of Necessary Parties.*—Where it appears from the answer and testimony that there was an absence of necessary parties to the bill, the bill is properly dismissed, but without prejudice.—*Harper v. T. N. Hayes Co. et al.*, 174.

## DISCONTINUANCE.

See Criminal Law.

## ELECTION OF REMEDIES.

*Election of Remedies; Sale; Breach of Warranty.*—Plaintiff purchased of the defendant certain goods, and on examination found that they were of inferior quality, and of a different kind contracted for, whereupon plaintiff declined to receive the goods, and so notified defendant. Defendant refused to refund the money paid for them, and refused to take the goods back. Plaintiff then took the goods and sued for damages. Plaintiff did not by such action, elect a remedy and thereby estop himself to maintain this action.—*Brooks v. Romano*, 300.

*Same; Election of Remedies.*—The fact that plaintiff might have sued for a breach of the contract of carriage, did not preclude him from suing in case of negligence.—*Montgomery Traction Co. v. Fitzpatrick*, 511.



EXCEPTIONS. BILLS OF.

See Trial.

1. Construction.

*Exceptions, Bill of; Construction; Presentation of Error.*—

The bill of exceptions stated that the defendant thereupon offered in evidence "so much of the said book as applied to plaintiff's account, in connection with the evidence of the witness," and it also appears that the witness had testified concerning two or more books besides defendant's "semi-annual" book. It is not made to appear that the entries in one of the other books were correct. Held, as presented by the bill, the court cannot hold that the failure to permit the "semi-annual" book to be introduced was error, although of itself it might have been competent.—*Bienville W. Supply Co. v. Heironymus Bros.*, 265.

2. Time of Signing.

*Bills of Exception; Time of Signing.*—Where a bill of exceptions is not signed during the term at which the judgment is rendered, and no order is entered during the term extending the time for signing, it will be stricken on motion.—*Clarke v. Jernigan*, 365.

*Appeal; Bill of Exceptions; Time of Signing; Record.*—The court adjourned May 24th, and an order granting sixty days from that date for signing bill of exceptions was entered. A further order, undated, extended the time thirty days from July 22nd, was entered. The bill of exceptions was signed after the expiration of the time originally fixed. Held, that the record did not show that the time was extended before the expiration of the time first granted, and the bill of exceptions could not be considered.—*L. & N. R. R. Co. v. Dobson*, 419.

EJECTMENT.

See Adverse Possession.

1. Title of Plaintiff to Support.

*Ejectment; Plaintiff's Title.*—In ejectment plaintiff must show a regular chain of title back to some grantor in possession or to the federal government.—*Henry v. Brannan*, 323.

*Ejectment; Evidence of Plaintiff's Title; Adverse Possession.*—Where plaintiff claimed title through the adverse possession of her father, deeds from her sisters and brothers to her were admissible to show that whatever possessory title her father had was vested in her.—*Henry v. Frolichstein*, 330.

2. Evidence.

*Evidence; Admissibility; Conclusion.*—It is competent in an action of ejectment, to ask a witness how long a certain person lived on the land "claiming to hold" it for another person named.—*Henry v. Frolichstein*, 330.

3. Damages Recoverable In.

*Ejectment; Recovery of Damages.*—Under Section 1555, Code 1896, mesne profits only, and not damages for trespass are recoverable in ejectment.—*Henry v. Davis*, 350.

ESCAPE.

*Escape; Indictment; Punishment.*—Construing together Secs. 4707, 4710, 4461 and 4462, it is held that an indictment that charges that the defendant, having been convicted of grand larceny

ESCAPE—*Continued.*

and sentenced to the penitentiary, did attempt to escape before the expiration of his sentence from the county jail where he was held in custody under authority of law, charged the offense defined in Section 4707, and punishment should have been imposed under that Section, and not under Section 4710. (overruling *Bradford v. The State*, 146 Ala. 150, 41 South. 471.)  
—*Bradford v. The State*, 1.

## ESTOPPEL.

## 1. Equitable.

*Estoppel; Equitable Estoppel; Grounds.*—The fact that the land owner stated to the company that she wanted something done with the water that was being retained by its embankment and that she wanted the water carried off either by cutting a ditch or by a culvert, did not estop her to abate the nuisance caused thereby or to recover damages from the manner in which the ditch was constructed and efforts made by the railroad company to carry off the water, the land owner having no right to direct the railroad company with respect to the construction of its ditch and the manner in which it should provide for the flow of surface water.—*A. G. S. R. R. Co. v. Prouty*, 71.

## 2. By Assertion of Title.

*Estoppel; Assertion of Title.*—As to whether the wagons were sold to defendant or whether he was holding them as agent of the plaintiff, the fact that he stored the wagons in his own name claiming them as his own, will not estop him from explaining by competent evidence his reasons for so storing them.—*Owensboro Wagon Co. v. Hall*, 210.

## EQUITY.

See Pleading, and various titles of Equitable actions.

## 1. Bill.

*Equity; Bill; Multifariousness; Demurrer.*—The objection that a bill is multifarious may properly be taken by demurrer.—*A. G. S. R. R. Co. v. Prouty*, 71.

*Same.*—A bill was filed against two railroad companies alleging distinctive grievances; against one company for permitting a certain culvert to be filled up from its own neglect; against the other for digging a ditch along the north side of its embankment; and against the latter company for building a bridge over a certain creek, etc., and thereby obstructing the natural flow. The bill was dismissed as against the first company by complainant and judgment for costs entered against her thereon. Held, as the companies were not joint tort feors, the dismissal as to one did not discontinue the cause, but did relieve the bill of multifariousness.—*Ib.* 71.

*Equity; Pleading; Bill; Allegation of Age.*—A bill is not demurrable for failure to state the age of the parties thereto, unless it shows the incapacity of the parties to sue or be sued.—*City Loan & Banking Co. v. Poole*, 164.

*Same; Parties; Incapacity; Pleading.*—Where the complainant is incapacitated from suing, unless it appears on the face of the bill, it must be raised by plea.—*Ib.* 164.

**EQUITY—Continued.**

**2. Jurisdiction.**

*Equity; Jurisdiction; Adequate Remedy at Law.*—Chancery is without jurisdiction to grant relief against a mere preferential payment where the trustee has not exhausted his remedy at law.—*Brock & Spight, et al. v. Oliver*, 93.

**3. Defenses.**

*Equity; Fraudulent Conveyances; Pleadings; Answers; Pleas.*—The answer set up as a defense to the bill that the debtor had been discharged in bankruptcy, and the paragraph alleging such discharge concluded with a statement that defendants attached and made a part of the answer the decree of discharge as a plea in bar. Held, such paragraph was not a plea in form incorporated in the answer entitling defendants to a decree on the issue joined on the plea, in the absence of setting down the plea to be tested as to its sufficiency before a final submission of the cause.—*Brunson, et al. v. Rosenheim & Son*, 112.

*Equity; Pleading; Pleas; Sufficiency.*—While the rule is that when a plea is filed to a bill and its sufficiency in law is not tested, but issue is taken thereon, and the plea is sustained by the evidence, the defendant is entitled to a decree, although the matter alleged in the plea is immaterial, yet, when the complainant takes issue on the plea, or matter in avoidance is set up by amendment and such matter is proven the defendant will not be entitled to a decree.—*Id.* 112.

*Same.*—Section 701, Code 1896, does not prevent the filing of matters in confession and avoidance to a plea as an answer to a bill in chancery.—*Id.* 112.

**4. Motion to Dismiss.**

*Equity; Pleading; Defects; Motion to Dismiss; Demurrer.*—Where some of the averments of the bill give it equity, although the bill may be defective in other averments, the defects cannot be reached by motion to dismiss for want of equity, but must be pointed out by demurrer.—*Mayfield, et al. v. Schoolar*, 150.

*Equity; Dismissal of Bill; Considering Pleadings as Amended.*—The bill will not be taken as amended so as to allege that the complainants were infant and not capable of electing to reinstate their title, as against the motion to dismiss for want of equity, since to do so would permit of amendments of new and independent facts to those stated in the bill.—*Savage, et al. v. Bradley*, 169.

**EVIDENCE.**

(For evidence in particular actions or crimes see appropriate title, sub. Evidence. See Witnesses.)

**1. Primary and Secondary.**

*Evidence; Secondary Evidence; Writings Collateral to Issue.*—It was not incompetent to permit a witness to testify that he had been divorced from the defendant, who was under prosecution for an assault with intent to murder witness, on the ground that the decree of divorce was the best evidence, as the matter of divorce was a mere collateral incident to the matter at issue.—*Williams v. The State*, 4.

*Same; Secondary Evidence; Search for Primary Evidence.*—The statement "I cannot find them," is not the equivalent of proof that the required search had been made for the primary evi-

**EVIDENCE.—Continued.**

dence, so as to authorize the introduction of secondary evidence.—*Owensboro Wagon Co. v. Hall*, 210.

**Evidence; Secondary Evidence; Conveyances.**—Ownership of land cannot be proved by parol evidence, and hence a question "How many acres do you own there?" is objectionable.—*Tutwiler C. C. & I. Co. v. Wheeler*, 354.

**2. Expert and Opinion.**

**Same; Opinion Evidence; Identity.**—Where the evidence tended to show that accused shot at witness from the outside of the house through the window and immediately ran off, it was competent for the witness to testify "that from what he saw and in his best judgment it was the defendant who did the shooting."—*Williams v. The State*, 4.

**Evidence; Opinion Evidence; Expert Testimony; Construction of Contract.**—As to whether "old grading" is or is not included in "surfacing" mentioned in the contract, it is competent for those shown to be acquainted with that class of railroad construction work to say what the term of "surfacing" means, and whether it included "old grading" or not, which was necessary in that particular place.—*Henderson-Boyd Lumber Co. v. Cook*, 226.

**Same; Expert Opinion; Relevancy.**—It was competent and not irrelevant to show by a railroad man, shown to be an expert, as to whether the letting of seven empty cars down an incline twenty feet high was dangerous and perilous to the person riding them down.—*Woodstock Iron Works v. Kline*, 391.

**Same; Experts; Competency.**—One who had worked occasionally at railroad breaking, but who could not say that he understood the business thoroughly, was not competent to testify as to the difficulty or not of stopping a string of seven empty cars equipped with two brakes, going down an incline twenty feet high, before they reached a certain crossing.—*Ib.* 391.

**Evidence; Experts; Examination.**—A question to an expert concerning the latches in a switch where the injury occurred, "State whether or not these latches are safe on main slopes"; and the expert's answer thereto "I did not take them to be safe", was not open to the objection of calling for and containing a conclusion; it called for and gave the expert's opinion.—*Southern C. & C. Co. v. Swinney*, 403.

**Evidence; Opinion Evidence; Competency.**—A question which goes beyond the fact testified to by the witness and predicates his opinion on other matters, calling for the opinion of a witness as to the mental condition of the person is improper.—*Lovecman v. Birmingham Ry. L. & P. Co.*, 515.

**Evidence; Expert Testimony; Subject.**—Where a witness qualifies as an expert concerning the operation of street cars he may testify as to the distance in which a car could be stopped, running at the rate of speed of the car in question.—*Birmingham Ry. L. & P. Co. v. Randle*, 539.

**Evidence; Opinion.**—A motorman is not entitled to testify whether he stopped the car as soon as he could but must state what he did to stop the car and whether that was all that could have been done to stop the car as soon as possible.—*Ib.* 539.

**Same; Insanity; Non Experts.**—A non expert testifying on an issue of insanity must be required to state the facts on which his opinion is based.—*Ib.* 539.

**EVIDENCE.—Continued.**

*Evidence; Opinions; Injuries; Ability to Practice Medicine.*—It was incompetent for the physician to testify as to his opinion as to what per cent his ability to practice his profession had been decreased by his injuries.—*Dunn & Lallande Bros. v. Gunn*, 583.

**3. Judicial Notice.**

*Criminal Law; Judicial Notice.*—The court does not judicially know that "hop-ale or hop-jack" is a malt liquor.—*Daniel v. The State*, 44.

**4. Best Evidence.**

*Evidence; Best Evidence; Record of Court.*—The docket entries made by the probate court is the best evidence of the filing and docketing of the claim against the estate of the decedent.—*Gillespie v. Campbell*, 193.

**5. Conclusions.**

*Evidence; Conclusions.*—In order to determine bankrupt's ability to pay it was permissible to ask him how much of his income was necessary for the support of his family, as such a statement was the statement of a collective fact and not a conclusion.—*Torry v. Krauss*, 200.

*Same; Conclusion of Witness.*—Evidence of a witness that he did not see what plaintiff was doing at the moment of the accident but from his position afterwards, he must have remained sitting, is not a statement of a fact and is a mere conclusion.—*Southern C. & C. Co. v. Swinney*, 403.

*Evidence; Admissibility; Conclusion.*—Where plaintiff was injured by falling from a hand car while riding backward the court properly sustained an objection to the question whether or not he would have been injured had he occupied some other position, since the answer would have been a mere conclusion.—*So. Ry. Co. v. McGowan*, 440.

*Same; Conclusion.*—One may not testify that the motorman seemed to try to stop the car as quick as he could; he should be required to state what the motorman did in reference to an attempt to stop the car.—*Birmingham Ry. L. & P. Co. v. Randle*, 539.

*Evidence; Conclusion of Witness.*—The sender of a telegram may not testify that he delivered it to the company for the benefit of the addressee, it being a conclusion.—*Western Union Tel. Co. v. Heathcoat*, 623.

*Same.*—It is not a conclusion, and therefore not objectionable, whether one, if a telegram had been delivered at a certain time, could have reached a certain place by a fixed time.—*Id.* 623.

**6. Admissibility.**

*Evidence; Letters; Proof of Genuineness.*—Defendant cannot show by letters, purporting to be from plaintiff, that plaintiff was notified of a certain fact, without making proof that such letters offered in evidence for that purpose, were genuine, objection having been made on that ground.—*Owensboro Wagon Co. v. Hall*, 210.

*Evidence; Books of Account; Authentication.*—Entries on books of account are admissible as against the objection that the book was not regularly kept in the usual course of business,

EVIDENCE.—*Continued.*

where it was shown that a steam hoister was rented at a specific sum per day, and the owner thereof made entries on the book kept for that purpose of the number of days the hoister worked, based on reports made to him at the end of each week by his employee in charge of the hoister.—*Murray & Peppers v. Dickens*, 240.

*Same.*—The testimony showed that the owner of the hoister, which was rented for a specific sum per day, made entries on a book kept for that purpose of the number of days the hoister worked each week, based on the report of his employee in charge of the hoister. The employee, in charge of the hoister, testified that he made true reports every Saturday to the owner who entered the same at once in the book. Held, the entries were sufficiently corroborated by independent evidence, to render them admissible.—*Ib.* 240.

*Same.*—Entries regularly made by a party in a book kept for that purpose, from data furnished by an employee, where the employee testified that he knew of the correctness of the items and gave them correctly to the party entering them, and the party entering them testified that he entered the items as they were given to him, are admissible.—*Ib.* 240.

*Same.*—The entries above referred to in headnotes 1, 2 and 3 were admissible against the objection that the entries were not made contemporaneously with the transaction, they being made within a reasonable time, under the circumstances.—*Ib.* 240.

*Same.*—Under the contract, it being for the court to decide whether the hoister, when the employee had steam up waiting for directions to use it, was in service within the contract, (and if not other testimony might be introduced on which the jury could ascertain what should be deducted from the amount shown by the entries) entries made as set out in the above headnotes, were admissible in evidence.—*Ib.* 240.

*Ejectment; Directory Verdict; Evidence; Jury Question.*—Evidence in this case examined and stated and held not to authorize a direction of a verdict for the plaintiff, as the question of adverse possession, under it, was one for the jury.—*Henry v. Frolichstein*, 330.

*Evidence; Res Gestae.*—One of the defendant's witnesses having testified that the transfers were cut by a mechanical appliance, which always cuts a straight edge, it was competent to introduce in evidence a transfer issued simultaneously with that issued to plaintiff, as part of the res gestae to show how the transfer would have appeared if properly cut and to aid in determining how it was torn; it appearing that such transfer was issued to a companion of plaintiff at the time plaintiff's was issued.—*Montgomery Traction Co. v. Fitzpatrick*, 511.

*Evidence; Letters; Admissibility; Proof of Genuineness.*—In the absence of proof of the genuineness of the signature or that they were written in response to a letter from plaintiff, letters received by plaintiff are not admissible against the purported writer of his principal.—*L. & N. R. R. Co. v. Britton*, 552.

*Same.*—Where a letter was produced by defendant upon notice to do so, and it was shown to have been written by plaintiff in response to one from defendant's agent and mailed to him, it was admissible, if otherwise relevant.—*Ib.* 552.

*Same; Hearsay; Notice to Partner.*—It is hearsay or opinion evidence for a partner to state that his partner, or the firm,

**EVIDENCE.—Continued.**

had never been notified of a certain fact, and inadmissible.—*Dunn & Lallande Bros. v. Gunn*, 583.

**7. Proof of Pedigree.**

*Evidence; Proof of Pedigree; Declarations; Admissibility.*—To render competent the declarations of a person with respect to the pedigree of another person, it is necessary to show that the declarant was a member of the family to which it is sought to attach the third person.—*Scheidegger, et al. v. Terrill*, 338.

*Same.*—Where it was shown that the person testifying lived in Switzerland, and that his mother died there, his testimony stating that his mother stated that her sister lived in the United States, and that she used to receive letters from her, but that his knowledge of the fact that decedent's maiden name was the family name of his mother and that decedent married, was from documents received from Alabama, does not show a declaration of his mother, that decedent was a member of her family, and was inadmissible to show whether the decedent, dying while living in Alabama, was a sister of the mother of the witness, who died in Switzerland.—*Ib.* 338.

**8. Testimony on Former Trial.**

*Evidence; Absent Witnesses; Testimony at Former Trial.*—A sufficient predicate is shown for the introduction of the testimony of a witness taken on the former trial in the same case where it appears that a subpoena had been returned, after diligent search and inquiry for the witness, endorsed not found, and it further appears that the witness had left the county for his home in another state.—*Woodstock Iron Works v. Kline*, 391.

**EXECUTORS AND ADMINISTRATORS.**

**1. Claims Against.**

*Administrator; Action Against; Complaint.*—The complaint claimed by an account stated against the administrator of a certain date; by account stated between plaintiff and decedent on the same date; for work and labor done for decedent, and averred that said claim was verified by affidavit and filed in the office of the judge of probate within twelve months of the grant of letters of administration, and that all the counts in the complaint are for one and the same cause of action. Held, sufficient, as against the objection that it fails to state for what the indebtedness was incurred; that it is indefinite as to whether the work was done for the administrator or for the decedent, and that it fails to show that the claim was filed in the probate court within twelve months of the grant of letters of administration.—*Gillespie v. Campbell*, 193.

*Same; Claim Against Decedent; Verification; Amendments.*—The omission in the verification of the claim that the sum demanded is the sum due after allowing all proper credits, is an amendable defect under section 133, Code, 1896.—*Ib.* 193.

*Administrators; Claims against the Estate; Evidence; Proof of Similar Transactions.*—In an action against the administrator for work and labor done for decedent during his last illness, it was irrelevant to show what the administrator paid others for waiting on decedent during his last illness.—*Ib.* 193.

EXECUTORS AND ADMINISTRATORS.—*Continued.*

## 2. Settlement of Claims.

*Executors and Administrators; Settlement of Claim; Authority; Plea.*—A plea alleging that the administrator settled the claim sued on is not subject to demurrer for failure to allege that the administrator received a reasonable amount in satisfaction of the claim and that settlement was authorized by the court, since sec. 138, Code 1896, does not prohibit an administrator from settling such claim without authority from the court.—*Loveman v. Birmingham Ry. L. & P. Co.*, 515.

## 3. Settlement of Accounts.

*Administrators; Account; Form.*—The statement of an administrator's account should not embrace charges against the distributees on their distributive shares. Such account should state the debits and credits regardless of the distributees shares, and after the ascertainment of the distributive share of each, the advancement made them should be charged against the distributive share of each.—*Howard, et al. v. Ruthersford*, 661.

*Same.*—Although the account was irregular in form, if the distributees of the estate have received all they are entitled to under a final distributive decree, they are not prejudiced by such irregularities.—*Ib.* 661.

*Same; Statement of Account.*—The court in stating the account made annual stops, crediting the administrator with the current expenses of administration, and charging him with interest at eight per cent on the dollar until the settlement, and in the calculation, deducted from the share of each distributee the advancement made to each during the particular year and charging the administrator with interest on the balance from the annual stops so made. Held, not prejudicial to the distributees.—*Ib.* 661.

*Same; Credits; Taxes.*—An administrator is properly credited with State and county taxes assessed against the estate and paid by the administrator.—*Ib.* 661.

*Same; Distribution; Charges; Board of Distributees.*—Under Sections 227 and 239, Code of 1896, the charges for board against the distributees were properly allowed the administrator on final settlement and distribution against their distributive shares.—*Ib.* 661.

*Same; Costs; Attorneys Fees; Guardian Ad Item.*—An administrator is properly allowed attorney's fees, guardian ad item fees and costs on a settlement of his account.—*Ib.* 661.

## FORMER ADJUDICATION.

See Trial.

*Same; Law of the Case; Instructions.*—The giving of an instruction which asserts a proposition contrary to the law of the case as formerly decided, is error.—*Owensboro Wagon Co. v. Hall*, 210.

## FRAUDS, STATUTE OF.

## 1. Sale of Lands.

*Frauds, Statute of; Contracts for Sale of Land; Part Performance; Effect.*—An oral contract for the sale of real estate is not violative of Section 2152, Code 1896, where the purchaser went into possession and subsequently paid the purchase price,



FRAUDS, STATUTE OF—*Continued.*

or where he paid the purchase price and subsequently went into possession.—*City Loan & Banking Co. v. Poole*, 164.

*Frauds, Statute of; Contracts for Sale of Real Estate; Requisites.*—To be without the statute of frauds, the writing constituting the contract for the sale of real estate must state the contract with such certainty that its essentials will be known from the memorandum itself or by reference therein to some other writing without recourse to parol evidence.—*Patt v. Gerst*, 287.

*Same; Evidence.*—The contract relied on for the sale of real estate was sought to be evidenced by certain letters and telegrams which did not describe the property nor state the contents, a telegram from the owner reciting that he would sell the property for a certain sum cash and certain propositions made by his agents, resting in parol, and a deed drawn up at the instance of the owner describing the premises, but which was not delivered and which showed that the parties did not agree as to the terms of the sale; Held, not to show a sufficient compliance for a sale of real estate under the statute of frauds.—*Ib.* 287.

## 2. Contracts not to be Performed within the Year.

*Statute of Frauds; Contracts not to be Performed Within the Year.*—The written contract provided that it should remain in full force for a year, but that the second party might at his option renew it for an additional period of five years. Held, it was not necessary, to save the contract from the statute of frauds, that the parties thereto enter into a new writing.—*Byrne Mill Co. v. Robertson*, 273.

## FRAUDULENT CONVEYANCES.

*Fraudulent Conveyance; Prima Facie Case; Burden of Proof.*—Proof of the existence of complainant's debt before and at the time of the alleged conveyance, that complainant recovered judgment, and that execution had been returned no property found, together with the insolvency of the debtor, establishes a prima facie case and places the burden of proof on the defendant to show that the conveyance was not fraudulent, but for a consideration not less than the fair value of the property.—*Brunson v. Rosenheim & Son*, 112.

*Same; Homestead.*—The conveyance of the homestead by a debtor is not subject to attack by his creditors as such homestead is exempt from execution.—*Ib.* 112.

*Same; Constructive Notice.*—If the grantee in a fraudulent conveyance has knowledge of facts sufficient to put him on inquiry, which if followed out would have led to knowledge of the fraudulent intent, it was not material that he did not have actual knowledge of such intent.—*Ib.* 112.

*Fraudulent Conveyances; Invalidity as Against Existing Creditors.*—A voluntary conveyance from a husband to his wife is void as to existing creditors.—*Allen v. Caldwell, Ward & Co.*, 293.

*Same; Effect as to Subsequent Creditors.*—A voluntary conveyance from a husband to his wife is valid, where all of his existing creditors were secured, and it does not appear that he foresaw future liability, as to subsequent creditors, under the rule that a voluntary conveyance is valid against subsequent creditors in the absence of actual fraud.—*Ib.* 293.

FRAUDULENT CONVEYANCES—*Continued.*

*Same; Effect of Delay in Recording Conveyance.*—The failure to record a deed voluntarily executed by a husband to his wife is not, of itself, evidence of a fraudulent conveyance, and where consistent with good intentions, the law attributes no bad motive to the grantee.—*Ib.* 293.

*Same; Action to Set Aside; Sufficiency of Evidence.*—The evidence in this case examined and held not sufficient to show that the deed from the husband to the wife was executed at a later date than is purported on its face, and after the debt to plaintiff was incurred.—*Ib.* 293.

*Same; Subsequent Creditors; Burden of Proof.*—The burden is on the creditor to show that the deed was actually executed subsequent to the creation of the debt where the deed on its face antedates the creation of the debt.—*Ib.* 293.

## GAMBLING.

See Contracts.

## HIGHWAYS AND STREETS.

See Municipal Corporations.

## 1. Definition.

*Highways; Definition; Public Highways.*—A public highway is one established in a regular statutory proceeding, or one used by the public for twenty years or more, or one under the control of the public dedicated by the owner; and every public thoroughfare is a highway.—*Dunn & Lallande Bros. v. Gunn*, 583.

## 2. Obstruction.

*Same; Regulation; Obstruction; Notice.*—The owner of land who permits the use of a road over it cannot place obstructions dangerous to travel in the same without giving notice to those using it, nor can he license a third person to do so.—*Dunn & Lallande Bros. v. Gunn*, 583.

*Highways; Obstructions; Owner of Property; Authority to Obstruct.*—The fact that the owner of the property had authorized defendant to cut a ditch across a road over said property used by the public would not authorize the cutting of said ditch in such a manner as to endanger a traveller along the road in the night.—*Ib.* 583.

## 3. Action and Pleadings as to Obstruction of.

*Same; Actions; Pleadings; General Issue; Special Defense.*—It was not error to sustain a demurrer to a plea denying the existence of a public or neighborhood road as alleged in the complaint, where the general issue had been interposed also.—*Dunn & Lallande Bros. v. Gunn*, 583.

*Same; Knowledge of Defendant.*—A plea asserting that the road referred to in the complaint was so indistinct that it did not appear to ordinary observation to be a road used by the public, is demurrable in not alleging that the defendants did not know that it was used by the public.—*Ib.* 583.

*Same.*—A plea stating that the place where plaintiff was injured was not in a town as specifically alleged in the complaint, states a defense available under the general issue; and the further allegation therein that it was not reasonably obvious to defendants that such ditch would be dangerous, but failing to state that it was not dangerous, or that defendant

HIGHWAYS AND STREETS—*Continued.*

did not know it was dangerous, does not state a defense to the action.—*Id.* 583.

## 4. Revocation of Right to Use.

*Same; Use of Road; Revocation of Right; Notice.*—The fact of the revocation of the right to use a road, without notice of such to persons accustomed to use it, is no defense to an action for injuries by obstructions placed thereon.—*Dunn & Lalande Bros. v. Gunn*, 583.

## HOMICIDE.

See Criminal Law—Conspiracy.

## 1. Assault with Intent.

*Criminal Law; Trial; Jury Question.*—Where the evidence tended to show that the defendant shot at the prosecutor from the outside of his house through the window, the question of whether defendant was guilty of assault with intent to murder was properly submitted to the jury.—*Williams v. The State*, 4.

## 2. Instructions.

## (a) Imminent Danger.

*Homicide; Instructions; Imminent Danger.*—A charge asserting that if the jury believe from the evidence that the defendant was being attacked by E. with a bar of iron, and that he was attacked by deceased with a razor, without fault on defendant's part, or that he was attacked by deceased while he was being assaulted with a deadly weapon by another, then the jury must acquit him, failing to hypothesize imminence of danger to life or limb, was erroneous and properly refused.—*Creagh v. The State*, 8.

## (b) Degree of Offense.

*Same; Degree of Offense; Sufficiency of Instruction.*—An instruction asserting that if the jury believe from the evidence that the killing grew out of a difficulty that started in the house after defendant went into the house, or that the killing grew out of a difficulty that started in the house, then they could not find defendant guilty of any offense higher than manslaughter, pretermittting all inquiry as to who brought on the difficulty that led to the killing, was erroneous and its refusal proper.—*Creagh v. The State*, 8.

## (c) Self Defense.

*Homicide; Self Defense; Instructions.*—An instruction predicating an acquittal on impending danger to life or of great bodily harm that does not hypothesize that such reasonable belief therefor had been begotten by the attending circumstances, fairly creating it and honestly entertained by the defendant at the time the fatal shot was fired, is erroneous and properly refused.—*Nelson v. The State*, 26.

## 3. Evidence.

## (a) Dying Declarations.

*Homicide; Evidence; Dying Declaration; Predicate.*—A sufficient predicate was laid for the admissions of dying declarations where it was shown that deceased said that he could not get well, but was going to die, and wanted to be at home when he died.—*Logan v. The State*, 11.

**HOMICIDE.—Continued.**

## (b) Previous Difficulty.

*Homicide; Evidence; Previous Difficulty.*—The defendant cannot testify as to the particulars of a previous difficulty between him and deceased, where the state has not shown a previous difficulty.—*Logan v. The State*, 11.

## (c) Generally.

*Homicide; Evidence; Jury Question.*—Under the evidence in this case it was a question for the jury whether the defendant was guilty of murder.—*Young v. The State*, 16.

*Criminal Law; Murder; Evidence; Res Gestae.*—It was shown that defendant and others had been gambling, that defendant had lost and was ill-tempered, that decedent threw straw upon the fire which blazed up suddenly against defendant, all a short time before the shooting. Held, competent as part of the res gestae, and as illustrating the frame of mind of defendant at or about the time of the shooting, especially where the defense was that the shooting was accidental.—*Id.* 16.

*Same.*—The declarations of a bystander, "Come back, it was an accident!" are admissible as part of the res gestae, and as showing the conduct and demeanor of the defendant at or about the time of the shooting especially as defendant returned in response thereto.—*Id.* 16.

*Homicide; Proof of Conspiracy; Admissibility.*—The state relied on the existence of a conspiracy between the son, who did the actual shooting, and the accused to kill deceased, and it was competent to show in support thereof that prior to the killing accused stated that if his son should kill deceased, no more attention would be paid to it than if he killed a dog, and that he and his son were looking for decesel, and wanted to be ready when he came.—*Ferguson v. The State*, 21.

**HUSBAND AND WIFE.**

## 1. Conveyance to Secure Debt of Husband.

*Husband and Wife; Conveyance by Wife to Secure Husband's Debt; Validity.*—A conveyance by a husband and wife of the wife's separate estate to secure the debt of the husband is absolutely void and confers no title.—*Harper v. T. N. Haynes Co., et al.*, 174.

**INDICTMENT AND INFORMATION.**

See appropriate title for indictment in particular crimes.

## 1. Endorsement On.

*Criminal Law; Endorsement of Witness on Indictment; Necessity.*—The fact that a witness' name was not endorsed on the indictment under which defendant was being tried, offers no and ground for objection to his testimony.—*Nelson v. The State*, 26.

## 2. Sufficiency.

*Same; Indictment; Sufficiency.*—An indictment charging that the defendants willfully injured or defaced the property of a person therein named is not open to the objections that it fails to allege the ownership of the dwelling, and that it charges the defendants with committing the offense jointly.—*Perry, et al. v. The State*, 40.

INDICTMENT AND INFORMATION—*Continued.*

*Intoxicating Liquors; Indictment; Requisite.*—An indictment charging that the defendant sold spirituous, vinous or malt liquors without a license and contrary to law, is in code form and unobjectionable.—*Daniel v. The State*, 44.

*Same; Sale or Gift.*—An indictment charging that defendant gave away or otherwise disposed of spirituous, vinous or malt liquors without license and contrary to law, charges no offense.—*Ib.* 44.

3. How to Reach Defect.

*Indictment; Demurrer.*—The proper mode of reaching a defect in an indictment is by demurrer and not by motion to quash.—*Daniel v. The State*, 44.

*Same; Discretion of Court.*—Motion to quash an indictment for defects in the charging portion is addressed to the discretion of the court, and is not reviewable unless abused.—*Ib.* 44.

INJUNCTION.

1. Pendente Lite.

*Injunction; Pendente Lite; Dissolution.*—An injunction restraining the cutting and removal of timber pending a suit to quiet title to the timber, should not be dissolved on the coming in of an answer which merely asserts a fee simple title to the pine timber and makes no denial as to the other timber.—*Goodson v. Stewart, et al.*, 106.

1½. When Issued.

*Injunction; Breach of Contract; Stipulation for Damages for Breach.*—That the contract stipulated for damages for its breach does not oust the jurisdiction of equity to enjoin a breach of the contract.—*Harris v. Theus, et al.*, 133.

*Same; Trade Agreement.*—It is not necessary to wait until one engages in a business which will breach the contract, to invoke the aid of equity, as equity will enjoin a preparation to begin the business.—*Ib.* 133.

*Same; Parties Defendant; Husband and Wife.*—Upon the allegation that defendant and his wife designed to evade an agreement made by defendant not to engage in a certain business, by arranging to establish the business in the name of the wife, the wife is a proper party defendant to a proceedings to enjoin a breach of the agreement.—*Ib.* 133.

*Injunction; Disturbance of Religious Worship.*—A bill will lie to enjoin non-members of a religious organization from forcibly entering a church, changing the locks thereon, threatening to disturb and interfere with the rights of the trustees in their possession and control of the church property, and interfering with the orderly worship of God, although civil courts will not hear and determine controversies pertaining to the ecclesiastical or spiritual features of a church.—*Christian Church of Huntsville v. Sommer, et al.*, 145.

2. Jurisdiction of Equity.

*Injunction; Jurisdiction; Equity; Trespass.*—Where a single action at law will not furnish an adequate remedy, and a multiplicity of suits can be avoided by proceedings in chancery, equity has jurisdiction concurrent with courts of law to protect a land owner against constant and frequently recurring injuries from wrongful diversion of water, and will enjoin a

INJUNCTION—*Continued.*

wrong-doer without regard to his ability to respond in damages.  
—*Cobia, et al. v. Ellis*, 108.

*Same; Retention of Jurisdiction to Award Damages.*—Where equity has assumed jurisdiction of an action for injunction to restrain the wrongful overflowing of plaintiff's land, the court will ascertain and award damages to the injured party in order to settle the whole controversy.—*Ib.* 108.

*Same; Laches; Statute of Limitations.*—Complainant is not barred by mere laches short of the period prescribed by the statute of limitations, where he is otherwise entitled to an injunction to prevent the overflowing of his land, caused by an increase in the height of a dam constructed by defendant.—*Ib.* 108.

## 3. Suit on Bond.

*Injunction; Action on Bond; Parties Plaintiff.*—The injunction bond providing payment of all such damages and costs which any person may sustain, an action thereon may be properly brought by all the obligees therein for the use of one as the party who has been damaged by the injunction suit.—*Babcock v. Reeves, et al.*, 665.

*Same; Complaint; Allegations of Breach; Sufficiency.*—An allegation in the complaint on an injunction bond that the bill had been dismissed and the injunction dissolved, was a sufficient averment of the breach.—*Ib.* 665.

*Same; Sufficiency of Bond.*—Where the complainants gave the bond under Section 788 and subsequently were ordered to give bond under Section 786, and made such bond, on a dissolution of the injunction, the obligees can maintain an action on the first bond, whether properly given under the statute or not, and it was good as a common law obligation and binding on the surety.—*Ib.* 665.

*Same; Evidence; Admissibility.*—It is proper to introduce the proceedings and decree in the injunction suit in support of an action on the bond.—*Ib.* 665.

*Same; Damages; Instructions.*—It appearing that the injunction suit was against R. and L. and that R. had been active in the defense and had employed counsel therein, an instruction, asserting that if the attorney both represented R. and L., the services for the one being the same as for the other, and the attorney rendered the services for L. gratuitously, complainant would not be entitled to recover more than one-half of a reasonable attorney's fee, was erroneous and properly refused.—*Ib.* 665.

## INNKEEPERS.

*Innkeepers; Duty as to Furnishing Accommodations.*—In the absence of special contract under Section 2539, Code 1896, the common law rule measures the liability of an innkeeper, and while he may assign the guest to another proper apartment, he may not put him out of the apartment assigned him and refuse to furnish him other proper accommodations.—*Hervey, et al. v. Hart*, 604.

## INTOXICATING LIQUORS.

*Intoxicating Liquors; Evidence; Jury Question.*—Whether hop-ale or hop-jack is a malt or intoxicating liquor, is one of fact for the jury to determine.—*Daniel v. The State*, 44.

INTOXICATING LIQUORS.—*Continued.*

*Same; Evidence; Admissibility.*—Where the defendant is charged with the sale of spirituous, vinous or malt liquors, and it is sought to establish the charge that he sold hop-ale or hop-jack, it is competent for the defendant to show by the manufacturer of such beverage that it was not spirituous, vinous or malt liquor.—*Ib.* 44.

*Intoxicating Liquors; Sale; Evidence.*—Evidence that the clerk sold the liquor without a showing that defendant authorized a sale, will not support a charge of the sale of the liquor by the defendant.—*Ib.* 44.

*Intoxicating Liquors; Offense; Liquor's Prohibited; Malt Liquor.*—Under Acts 1886-87, p. 665, it is an offense to sell a fluid containing malt, or a weak solution of malt liquor, although such liquid is without intoxicating effect.—*Dinkins v. The State*, 49.

JUDGES.

See Courts.

(1) Appointment of.

*Judges; Appointment; Election.*—A judge of probate was appointed by the Governor to fill a vacancy occurring by death of incumbent on May 6th, 1906. Held, that under the constitution, and the rule of excluding the one day and including the other, the appointment was made more than six months prior to the election, and the vacancy was properly filled by election at the general election.—*Foster v. State, ex rel. Stanford, et al.*, 632.

JUDGMENT.

See Criminal Law.

1. Equitable Relief Against.

*Judgment; Equitable Relief; Injunction; New Trial.*—Although there was no authority for holding the court at the time the new trial was granted, and the granting of the new trial was therefore void, equity has no jurisdiction to enjoin the proceedings under the judgment or to compel the granting of a new trial.—*Norwood v. L. & N. R. R. Co.*, 151.

JUDICIAL NOTICE.

See Evidence, § 3.

JURY.

1. Grand Jury. Organization and Drawing.

*Grand Jury; Authority to Select; De facto Commissioners.*—The two commissioners who drew the grand jury each held commissions to their office at the time they drew the grand jury, and they were de facto officers and their acts valid, although they were subsequently ousted from office.—*Logan v. The State*, 11.

2. Petit Jury.

(a) Special Venire.

*Jury; Special Venire; Serving List; Motion to Quash.*—Nine of the special jurors drawn for defendant's trial were not summoned, but their names appeared on a list served upon defendant. Held, no grounds for quashing the venire.—*Young v. The State*, 16.

*Same.*—Although fifteen of the jurors drawn upon the special venire and served upon defendant did not appear, and their

## JURY—Continued.

absence was not explained and the court did not enter forfeitures against them, it furnished no grounds for quashing the venire.—*Ib.* 16.

## 3. Demand for Trial by.

*Criminal Law; Misdemeanor; Jury Trial Demanded; Necessity for Indictment.*—Where the prosecution is begun upon affidavit and warrant before a justice of the peace, and the defendant demands a trial by jury, the defendant cannot be tried except upon indictment returned by the grand jury.—*Jones v. The State*, 63.

## LACHES.

See Injunction.

## LANDLORD AND TENANT.

## 1. Lien for Rent.

*Landlord and Tenant; Lien for Rent; Superiority over Chattel Mortgage.*—The lien for rent of the landlord and his assignee on a crop raised in the current year, is superior to that of a mortgagee under Sections 2703-06, Code 1896, and the landlord and his assignee are not restricted to any particular portion of the crop of the enforcement of their lien.—*Wilson & Son v. Curry*, 368.

## LARCENY.

*Larceny; Sufficiency of Evidence.*—Evidence in this case examined and held sufficient to warrant the jury in finding that defendant obtained the property with fraudulent intent to convert it to his own use.—*Thompson v. The State*, 37.

## LICENSES.

## 1. Municipal.

*Licenses; Municipal Corporation; Incorporation under Special Act.*—The general acts of incorporation has no application to a case of a violation of the city ordinance for carrying on business without license, where the city was incorporated by special act of the legislature.—*Mayor, etc. of Ensley v. Cohn*, 316.

## 2. Carrying on Business Without.

*Licenses; Violation of; Carrying on Business.*—In the absence of evidence to show that a sale was made, one cannot be convicted for engaging in or carrying on a business, to do which a license is required; mere preparations to engage in or carry on such business will not warrant a conviction.—*City of Bessemer v. Dickens*, 322.

## LIFE ESTATE.

*Life Estate; Action by Life Tenant.*—While a life tenant may maintain trespass quare clausum for damages to his possession, he cannot maintain trover for the conversion of trees growing on the land, nor trespass de bonis asportavis for the taking of them.—*C. W. Zimmerman Mfg. Co. v. Duffin*, 380.

## LIMITATION OF ACTIONS.

*Limitation of Action; Part Payment.*—The payment of interest on a note secured by a mortgage relieved both note and mortgage from the operation of the statute of limitations.—*Courtner v. Etheridge, et al.*, 78.



**LIMITATION OF ACTIONS.—Continued.**

*Limitation of Action; Pleading; Demurrer.*—Where the complaint fails to show the time of the alleged wrong and damages, if it is desired to show that such damages was barred by limitations, it must be done by plea and cannot be raised by demurrer.—*Tutwiler C. O. & I. Co. v. Wheeler*, 354.

*Limitation of Action; Commencement of Action; Amendment.*—Intestate was killed Nov. 13, 1901, and suit for his death was commenced Nov. 12, 1902, and an amendment to the declaration was filed Dec. 4, 1905. Held, that the amendment was not barred by the statute of limitations, if within the lis pendens.—*Woodstock Iron Works v. Kline*, 391.

*Limitation of Actions; Commencement of Action; Amendment to Complaint; New Cause of Action.*—The original complaint placed the injury as occurring on the line of defendant's railway running from B. to W. at or near B., and charged the negligence to be that of the defendant. The amendment alleged the injury to have occurred at or near B. on defendant's line of railway running from B. to E., and alleged the negligence to the defendant's servant or agent, acting within the line and scope of his authority as such. Held, not to state a new or different cause of action, and that the amendment related back to the filing of the original complaint, and was not barred by statute of limitations of one year.—*Hess v. Birmingham Ry. L. & P. Co.*, 499.

*Same.*—A count in wanton or wilful conduct, alleging the negligence in the defendant, was a count in trespass, and an amendment changing the allegation of negligence in the defendant to the negligence of the defendant's servant or agent, acting within the line and scope of his employment as such, made the count one in case, and was a departure from the count as originally filed, did not relate back, and was subject to the statute of limitation of one year.—*Ib.* 499.

**LOGS AND LOGGING.**

1. Sale and Right to Remove.

*Logs and Logging; Sale of Standing Timber; Right to Remove.*—Where the owner of land executes a conveyance to all the timber of a certain size, the legal title to the timber is in the grantee, and he may remove it after the time limit fixed in the conveyance, in this case two years, but for so doing, he is liable to the grantor in an action for trespass quare clausum for such actual damages as is sustained to the possession.—*C. W. Zimmerman Mfg. Co. v. Daffin*, 380.

**MALICIOUS MISCHIEF.**

1. Defacing Buildings.

*Malicious Mischief; Willful Injury to Real Estate.*—The offense denounced by Section 5620, Code 1896, is one against the possession and does not involve ownership; Hence, one charged with that offense is not entitled to inquire into the right of the possession of the person in actual occupancy at the time of the injury.—*Perry, et al. v. The State*, 40.

**MANDAMUS.**

1. Subject of.

*Mandamus; Subject of Relief; Proceedings of Court; Record.*—As each court must, of necessity, make up its own record and certify to them, the supreme court will not compel the circuit

MANDAMUS—*Continued.*

court to take and treat as a bill of exceptions a paper which had been stricken from its records by the probate court prior to the appeal to the circuit court.—*Ex parte Walker, et al.*, 637.  
*Mandamus; Acts of Public Officers; Matters of Discretion.*—Mandamus does not lie to compel an officer to issue a license where the performance of that duty rests upon the ascertainment of facts or the existence of conditions, to be determined by such officer, in his judgment or discretion.—*State, ex rel. Ducourneau v. Langan*, 647.

## MASTER AND SERVANT.

See Railroads, Street Railways, Carriers.

## 1. Injury to Servant.

## (a) Complaint, Sufficiency.

*Master and Servant; Injury to Servant; Complaint; Sufficiency.*

—A complaint, one count of which alleged that while in the employment of the defendant, and in the active discharge of his duties, plaintiff was injured (setting out his injuries), that they were caused proximately by the negligence of a certain flagman in defendant's service, who had charge of the signal for notifying those in charge of trains following defendant's train, and its presence on the main line, and that such flagman negligently failed to set out such signal, etc.; and another count averring said injuries to have been proximately caused by the negligence of a certain person in defendant's employ in failing to have signals placed in the rear of said first mentioned train when the same was stationary, and when another train was approaching such stationary train, or station where said train was, is not demurrable for a failure to show any causal connection between the injuries and the negligence complained of.—*L. & N. R. R. Co. v. Dobson*, 419.

*Same; Injury to Servant; Complaint; Sufficiency.*—A complaint which alleges that the employer owned and operated a plant and a railroad and that plaintiff's intestate was killed by cars striking other cars while loading them in consequence of the negligence of an employee on the railroad states a cause of action under subdivision 5, section 1749, Code of 1896.—*Ala. Steel & Wire Co. v. Griffin*, 423.

*Master and Servant; Injury to Servant; Complaint; Sufficiency.*

—A complaint alleging that the employer was operating a plant, and that while the plaintiff's intestate was engaged in and about the business of the employer at or near the plant, he was struck by cars operated on a railroad owned by the employer, does not state a cause of action under subdivision 5 of section 1749, Code 1896; it being wanting in averment that intestate was employed in or about the railway, or that he was discharging any duty in connection therewith.—*Id.* 423.

*Master and Servant; Injury to Servant; Complaint.*—The count was not subject to demurrer for failing to show that the superintendent knew, or was negligent in not knowing of the defective condition of the appliance used, or for not showing that the alleged defective condition of the appliances used arose from defendant's negligence, or that it did not show that the car was in a defective condition.—*Southern Ry. Co. v. McGowan*, 440.

*Master and Servant; Injury to Servant; Complaint; Sufficiency.*—A complaint alleging that while in the discharge of his duties

MASTER AND SERVANT.—*Continued.*

as an employe in defendant's mine, a stick of dynamite exploded in his hand, injuring him, and that the injury was proximately caused by the negligence of the employer in failing to provide a reasonably safe place, to work, shows sufficiently a causal connection between the injury and the negligence, and is not open to demurrer that it does not state facts sufficient to constitute a cause of action, that no act of negligence is averred, and that the negligence averred is a conclusion.—*Wolf v. Smith*, 457.

*Master and Servant; Injury to Servant; Complaint; Sufficiency.*—A complaint alleging that it was the duty of the mine operator, while operating it, to provide a stretcher and a woolen and water-proof blanket for use in carrying away injured persons, and to keep in store at the mine, oil, and bandages for use in emergency, and that the operator of the mine failed to furnish such articles, sufficiently states the duty imposed on the mine operator by Section 2917 of the Code of 1896.—*Ib.* 457.

*Master and Servant; Injury to Servant; Fellow Servants; Complaint.*—A complaint which alleges that plaintiff was a brakeman on a logging train and received injuries while operating said train, that he was working under the engineer who was entrusted with the superintendence of plaintiff and of the operation of the train, and that while plaintiff was engaged in operating the trains, he was injured, and that the injuries were caused by the negligence of the engineer while in the exercise of such superintendence, shows that the negligence of the engineer while in the exercise of his superintendence, and not as engineer, caused the injury, and is a good complaint under subdivision 2 of Section 1749, Code 1896.—*Creola Lumber Co. v. Mills*, 474.

*Same; Allegation of Negligence; Sufficiency.*—Where the complaint shows the duty of the employer to exercise care and his failure to do so, the negligence causing the injury may be averred in general terms.—*Creola Lumber Co. v. Mills*, 474.

*Same.*—A complaint which alleges that the engineer in charge of the train was entrusted with the superintendence of the operation of the same, and of the person injured, and that the injuries were caused by reason of the negligence of the engineer, to whose directions the brakeman, at the time of the injury, was bound to conform and did conform, and that the injury resulted from the brakeman having so conformed, while the engineer was in the exercise of superintendence states a good cause of action under subdivision 3 of Section 1749, Code 1896; the gravamen of the charge being that the injury resulted from the brakeman having conformed to a negligent order given by a co-employee to whose orders he is bound to conform.—*Ib.* 474.

*Same.*—A complaint based on subdivision 3, Section 1749, Code 1896, must aver the order given and conformed to and that the order was negligently given.—*Ib.* 474.

*Same.*—A complaint alleging that the injury was caused by the negligence of the engineer employed to operate the train, while so "engaged in the operation thereof," sufficiently alleges that the engineer had "charge or control of the train" within subdivision 5 of Section 1749, Code 1896.—*Ib.* 474.

MASTER AND SERVANT.—*Continued.*

## (b) Contributory Negligence.

*Master and Servant; Injury to Servant; Contributory Negligence.*

—A plea of contributory negligence, which alleges in the alternative, that plaintiff's intestate knew, or by reasonable care, could have known that the compressed air had not been released, was not a sufficient averment of such knowledge on the part of the intestate, knowledge being necessary, under the pleading in this case, to constitute contributory negligence.—*Jones, et al. v. Pioneer Min. & Mfg. Co.*, 402.

*Same.*—An employee engaged in repairing a defect in a blowing engine, has the right to presume that his superior, entrusted with superintendence of the work, has discharged his duty and released the compressed air before commencing the work, and he is, therefore, not required to exercise reasonable care to ascertain whether the engine is charged with compressed air or not, and cannot be charged with contributory negligence unless he knew that the compressed air had not been released.—*Ib.* 402.

*Same; Contributory Negligence.*—An employee of a coal mine left the mine by the usual and customary way, and under no emergency. Held, that he was not guilty of contributory negligence in going out by the route taken, though there was another way through which he could have passed in safety.—*Southern C. & C. Co. v. Swinney*, 405.

*Master and Servant; Injury to Employee; Contributory Negligence; Emergency.*—The rule being that in case of emergency and peril one is not held to that cool and deliberate exercise of judgment in conserving his safety that he would be held to under ordinary circumstances, it cannot be said, as a matter of law, that an employee, who was injured while going out of the mine along a haulage way, by a car which jumped the track, was guilty of contributory negligence in running to "a turnout", rather than to one of the "dog-holes" in the sides of the wall, even if such turnout was a less safe place.—*Ib.* 405.

*Same; Pleading; Contributory Negligence.*—A plea of contributory negligence for failing to choose a safe place in which to work but which does not allege that a safe place was known or apparent to plaintiff, was bad on demurrer.—*So. Ry. Co. v. McGowan*, 440.

*Same; Contributory Negligence; Jury Question.*—Although the act of dismounting was unnecessary, it is not, under all circumstances, negligence, as a matter of law, for a brakeman to dismount from a moving train and attempt to board the locomotive.—*Creola Lumber Co. v. Mills*, 474.

*Master and Servant; Injury to Servant; Contributory Negligence; Sufficiency of Plea.*—A plea of contributory negligence which alleges that plaintiff was guilty of contributory negligence, in that he attempted to get upon the locomotive while the same was in motion, failing to aver the facts showing wherein his attempt was negligent, is demurrable.—*Ib.* 474.

## (c) Assumption of Risk.

*Same; Assumption of Risk.*—An employee going out of a mine at an earlier hour than usual on account of sickness, by the usual route travelled, assumes merely the ordinary risk incident thereto, but does not assume the risk of the master's negligence.—*Southern C. & C. Co. v. Swinney*, 405.

**MASTER AND SERVANT.—Continued.**

*Same; Assumption of Risk.*—A plea of assumption of risk asserting that plaintiff was aware of the defect, that the defect was obvious and that if plaintiff remained in defendant's service without requesting the defendant to repair the same he assumed the risk, but failed to state that plaintiff knew or appreciated the risk arising from such defect, was bad on demurrer.—*So. Ry. Co. v. McGowan*, 440.

*Same; Assumption of Risk.*—An employe assumes only the risks incident to his employment and is not bound to give the master notice of defective appliances where the master knew of such defect.—*Ib.* 440.

*Same; Assumption of Risk.*—A brakesman charged with the duty of sanding the track assumes the danger incident to the business of boarding the locomotive while the train was moving, in order to reach the position from which to sand the track.—*Creola Lumber Co. v. Mills*, 474.

(d) Employment.

*Master and Servant; Injury to Servant.*—An employee in a coal mine became sick from bad air and quit his work before the end of the day. While going out, he met the superintendent of the mine, who stopped him to inquire why he was quitting his work. He was injured at this point and at that time. Held, that the injury occurred during the course of his employment.—*Southern C. & C. Co. v. Suttney, et al.*, 405.

(e) Negligence and Proximate Cause.

*Master and Servant; Negligence; Proximate Cause; Evidence.*—Where the evidence showed that latches in the switch where the accident occurred, were unsafe on a slope, that they were at the time loose and could be thrown by a car passing over the switch so as to change the switch and derail trailing cars, and that immediately after the accident the latches were repaired, it was sufficient to authorize the jury to infer that the derailment causing the accident was the result of a defect in the switch.—*Southern C. & C. Co. v. Suttney, et al.*, 405.

*Master and Servant; Injury to Employee; Negligence; Evidence of Knowledge.*—The evidence tending to show that the condition of the switch was the same at all such times, it was competent to prove accidents or wrecks at the same place shortly before the injury as tending to show knowledge of a defect in the switch on the part of the master.—*Ib.* 405.

*Master and Servant; Injury to Servant; Negligence; Evidence.*—The counts on which the case was tried not alleging negligence in the failure to have a headlight on the engine, evidence of a want of the headlight was immaterial.—*Ala. Steel & Wire Co. v. Griffin*, 423.

(f) Knowledge of Defect.

*Same; Knowledge of Defects by Master.*—If the master knows of the defect in his machinery, a servant does not assume the risk connected therewith by failing to give the master notice of the same, although he may not know that the master knew of the defect.—*So. Ry. Co. v. McGowan*, 440.

(g) Evidence.

*Master and Servant; Injury to Servant; Action; Jury Question.*—It was a question for the jury to determine whether the handle

MASTER AND SERVANT.—*Continued.*

of a car broke from its insufficiency to perform the service for which it was used or from a latent defect unknown to the master.—*So. Ry. Co. v. McGowan*, 440.

*Same.*—If the jury find that the breaking of the handle of a car was due to its insufficiency to perform the service for which it is used, it is still a question for them to determine under the evidence whether the insufficiency of the handle was known to the defudant so that he assumed the risk.—*Ib.* 440.

*Same; Evidence; Admissibility.*—It was competent to permit plaintiff to prove that handles made of other wood could as easily have been put in as the one used since the failure of the defendant to get a better handle than the one used when it was as convenient to do so was a circumstance to be considered by the jury.—*Ib.* 440.

*Same; Evidence; Rules of Work.*—Where the plaintiff was injured by falling from a hand car while riding backward, and there was conflict in the evidence as to the existence of a rule forbidding employes to ride backward while working it was competent to show that others had been riding backward as tending to show non-existence of the rule.—*Ib.* 440.

*Master and Servant; Operation of Mine; Injury to Employee; Evidence.*—Evidence in this case examined and stated, and held sufficient to require a submission of the questions to the jury as to whether defendant was negligent, and as to assumption of risk and contributory negligence on part of plaintiff.—*Birmingham Min. & Cont. Co. v. Skelton*, 465.

*Same.*—One working a mine, whether a servant of the corporation, or working there by invitation, assumes the risk incident to the work, but increased risks caused from negligence of the mine operator are not incident to the business.—*Ib.* 465.

*Same; Proof of Negligence; Burden.*—An employee suing for personal injuries has the burden of showing that the negligence charged was the direct and immediate cause of the injuries complained of.—*Creola Lumber Co. v. Mills*, 474.

*Same; Evidence; Sufficiency.*—The evidence in this case examined and held insufficient to show that the obedience of the plaintiff to the orders of the engineer in control of the same, was the cause of the injuries, as is essential to a recovery under the pleading.—*Ib.* 474.

## (h) Instructions.

*Master and Servant; Death of Servant; Instructions.*—The fact that a minor servant, who is inexperienced, expresses a willingness to undertake the perilous work does not relieve the master of the duty of giving him proper instructions, unless the servant gives assurance that he understands the details of the work undertaken.—*Woodstock Iron Works v. Kline*, 391.

*Master and Servant; Injury to Servant; Orders of Foreman; Instructions.*—A charge asserting that if the employee stated to his foreman that he would ride the cars down, and the foreman thereupon told him to get on at the double brakes and hold the cars, such directions would constitute an order on the part of the foreman to employe to ride the cars down the incline, was properly given.—*Ib.* 391.

*Master and Servant; Injury to Servant; Action; Instruction.*—An instruction asserting that if someone unknown to the other employes had thrown the switch and they were not aware that the switch had been thrown, a verdict should be rendered for

MASTER AND SERVANT—Continued

defendant, was misleading and properly refused; as was an instruction asserting that if the person named in the complaint did not throw the switch, nor authorize the same to be thrown, and did not know that it was thrown so as to divert the cars on to the track where Intestate was working, there could be no recovery.—*Ala. Steel & Wire Co. v. Griffin*, 423.

*Master and Servant; Injuries to Servant; Instructions.*—The plaintiff was injured by falling from a hand car while riding backward, and the court instructed the jury that if it was not more dangerous for plaintiff to occupy the position he was occupying when he fell, except by reason of defendant's negligence or a defect in the handle of the car, then the fact that he did occupy that position would not bar a recovery unless the plaintiff knew of the danger. Held, proper.—*So. Ry. Co. v. McGowan*, 440.

*Same; Duty of Master; Jury Question.*—The court properly charged the jury that it was for them to determine whether the defendant was negligent in failing to remedy the defect in the handle of the car.—*Ib.* 440.

*Master and Servant; Injury to Servant; Instructions; Contributory Negligence.*—The court properly instructed the jury that if plaintiff could reasonably have used a less dangerous way of working the car, this would not bar his right of recovery, unless it appeared that he knew he was using the more dangerous way and that such use was negligent and that this negligence was the proximate cause of his injury.—*Ib.* 440.

*Same; Duty of Master.*—The court properly charged that it was the duty of defendant to use reasonable prudence in selecting a handle for the car and that plaintiff had the right to assume that the handle furnished was reasonable safe, unless he knew it was not, and he was under no duty to examine the handle.—*Ib.* 440.

*Same; Instructions General.*—The court properly instructed the jury that if the defective condition of the handle of the car was due to the negligence of the defendant and defendant negligently omitted to remedy the same the jury should find for the plaintiff, unless plaintiff own negligence contributed to his injuries.—*Ib.* 440.

*Same.*—The court properly refused to instruct the jury that the plaintiff could not recover if he knew the kind of wood used and its weakness, whether he knew it was dangerous to use such handle or not.—*Ib.* 440.

*Same.*—A charge asserting that there was no implied warranty on the part of the master that the tools or appliances furnished a servant were sound and fit for use was properly refused.—*Ib.* 440.

*Trial; Instructions; Proximate Cause.*—A charge is invasive of the province of the jury which asserts that the jury could not find that the defect in the handle was the proximate cause of the injury.—*Ib.* 440.

*Same; Assumption of Risk.*—Since the knowledge of the defect may not have apprised the plaintiff that it was dangerous to use the handle the court properly refused to instruct the jury that if the conditions of the handle was open to ordinary observation plaintiff could not recover.—*Ib.* 440.

*Same; Misleading Instructions.*—A charge asserting that the defendant is not bound to see that the handle of the car was free from such defect was properly refused, as tending to mislead

MASTER AND SERVANT—*Continued.*

the jury to conclude that there was no duty upon defendant to see that the handle was not defective although its defective condition may have been apparent on the examination.—*Id.* 440.

*Master and Servant; Injury to Servant; Action; Instructions.*—Where the complaint alleged that the handle of the car was weak and insufficient, that it was made of cedar, that it was split, that it was hollow, and that it was unsafe, the court improperly instructed the jury that the plaintiff could not recover if it was shown that the handle was insufficient and weak, as the charge relieved the plaintiff of proving other defects particularized and averred.—*So. Ry. Co. v. McGowan*, 440.

*Same; Instruction.*—A charge asserting that if plaintiff was hurt while fixing to set a temporary prop to support the roof, which fell on plaintiff, and plaintiff knew it was for such purpose, there must be a finding for defendant, premitting all negligence on part of defendant and hypothesizing none on part of plaintiff, was erroneous and properly refused.—*Birmingham Min. & Cont. Co. v. Skelton*, 465.

## 2. Statutory Regulations.

*Master and Servant; Statutory Regulation; Railroad Employees.*

—Subdivision 5 of section 1749, Code 1896, has application only to one employed in and about a railroad, and one seeking a recovery thereunder must allege and prove that at the time of the injury he was employed in and about a railway, and it is not sufficient that he was employed at the plant of an employer who also owned a railroad operated in furtherance of the business of the plant.—*Ala. Steel & Wire Co. v. Griffin*, 423.

*Master and Servant; Injury to Servant; Mines; Violation of Statute.*—Section 2917, Code 1896 imposes a statutory duty on the operator of mines for the benefit of the employee therein, and the mine operator is liable in a common law action to an employee injured in consequence of its violation, though such section neither attaches a penalty to nor provides a remedy for a failure to comply with its terms.—*Wolf v. Smith*, 457.

*Master and Servant; Injury to Servant; Mines; Violation of Statutory Duty.*—A negligent failure of an operator of a mine to comply with the requirements of Section 2917 of the Code of 1896, may give a cause of action to an employee injured while in the performance of his duty, without negligence on the part of the operator or his servant.—*Id.* 457.

## 3. Responsibility of Master for Negligence of Servant.

*Master and Servant; Negligence of Servant; Responsibility of Master; Wilfulness.*—An allegation of the negligence of the master may be sustained by proof of negligence of the servant, and when the master participated in the negligence of the servant by directing the latter to do or to perform the negligent act this would operate to change the master's act from simple negligence to intention or wilfulness, if the act complained of was intentionally or wilfully done.—*Birmingham Ry. L. & P. Co. v. Randle*, 539.

*Same; Wilful Act of Servant.*—Where the evidence did not disclose that the defendant corporation participated in the wilful act of its employee or thereafter ratified such act, a count charging defendant corporation with wilfulness or wantonness is not sustained by evidence of such acts on the part of its employee.—*Id.* 539.



## MINES AND MINERALS.

## 1. Operation of Mines.

*Mines and Minerals; Statutory Regulation; Validity.*—Section 2917, Code 1896, prescribes what shall be necessary as a part of the proper equipment of a mine before any person shall engage in the business of mining, and is valid as a regulation for the protection of the public welfare and comfort.—*Wolf v. Smith*, 457.

## MONEY HAD AND RECEIVED.

*Money Had and Received; Obligation to Repay.*—A landlord assigned and transferred the rent note before its maturity. After the transfer of the rent note, the land was sold under execution against the landlord. The purchaser at the execution sale, without notice of the transfer of the note, collected the rent; Held, the transferee of the note was entitled to recover the rents collected by the purchaser, in an action for money had and received.—*Young, et al. v. Garber*, 196.

## MORTGAGES.

## See Chattel Mortgages.

## 1. Absolute Deed; Conditional Sale.

*Mortgages; Absolute Deed as Mortgage; Conditional Sale.*—The complainant's husband being indebted to firm of which H. was a member, the complainant conveyed by deed absolute on its face lands belonging to her separate estate to H., who applied the purchase money to the husband's debt to the firm. Complainant averred that at the time of the execution of the deed to H. he agreed to reconvey the land to complainant on payment to him of the consideration therein expressed, with 8 per cent interest. Held, that the conveyance was not a mortgage, and invalid under section 2529 of the code of 1896, but was a conditional sale of the land with a right to repurchase, and not a mere security for the husband's debt.—*Maxwell v. Herzfeld, et al.*, 65.

*Mortgages; Absolute Deed as Mortgage; Evidence.*—The evidence must be clear and satisfactory to show that a conveyance purporting to be an absolute deed is a mortgage.—*Harper v. T. N. Hayes, Co. et al.*, 174.

*Same; Sufficiency of Evidence.*—The evidence in this case is examined and held that a deed absolute in form was intended as a mortgage.—*Id.* 174.

## 2. Equitable Mortgages.

*Mortgages; Equitable Mortgage; Intention of Parties.*—Although a conveyance may fall as a mortgage in conveying the legal title, where it is shown that it was the intent of the parties to the instrument that it should operate as a lien on certain land to secure the payment of borrowed money a court of equity will give such instrument effect as an equitable mortgage.—*Courtner v. Etheridge, et al.*, 78.

## 3. Foreclosure.

*Mortgages; Right of Foreclosure.*—The land conveyed in trust to secure the bonds was encumbered with a prior lien, and the mortgagor made a money deposit with the trustee to protect the bondholders against the lien. The trustee invested the deposit in some of the bonds secured by the deed of trust. Afterwards the mortgagor assigned the bonds so purchased by the

**MORTGAGES—Continued.**

trustee. Held, the assignee of the bonds became a bondholder with all the rights pertaining thereto, subject only to the equities of the other bondholders, arising out of the purpose of the deposit, and such assignee had the right to have the trust deed foreclosed, the property sold, and after the payment of the costs, prior encumbrances and the amount due on the bonds held by other bondholders, the proceeds applied to the payment of the bonds held by him.—*Moses v. Philadelphia M. & T. Co.*, 88.

**MOTION TO DISMISS.**

See Equity, § 4.

**MUNICIPAL CORPORATIONS.****1. Street Improvement.**

*Municipal Corporations; Contract for Improvement; special Assessment; Validity.*—The city charter required the treasurer to advertise for sealed bids for street improvement work, and that the contract be let to the lowest responsible bidder. An ordinance directed the officer to advertise for bids for street improvement according to plans and specifications on file in the city engineer's office, which plans and specifications required a two year's maintenance of the work. The advertisement published stated that only bids for ten years maintenance would be received. Held, under such published advertisement the city had no authority to close a contract for a two year's maintenance.—*City Council of Montgomery v. Barnett*, 119.

*Same.*—*Local Acts* 1900-01, pp. 1027 and 1029, authorizes the city to make street improvement and to levy assessments therefor, and to issue bonds for the purpose of improving the streets, the proceeds to be applied only to the paving or improvement designated by the ordinance. The ordinance passed provided for the paving of a certain street, the cost to be assessed against the abutting property to the amount that it had been benefited by the paving. Held, neither the act nor the ordinance authorized any contract for future maintenance, or the appropriation of any money raised from the sale of such bonds towards the payment of such a contract or any part of it, and such contract was void and proceedings thereunder would be enjoined at suit of tax payer.—*Ib.* 119.

**1½. Duty to Keep Sidewalks in Repair.**

*Municipal Corporations; Sidewalks; Duty to Keep in Repair.*—Under its charter (Acts 1900-01, p. 2342) it is the duty of the City of Mobile to keep its entire streets and sidewalks in reasonably safe condition for public travel.—*City of Mobile v. Shaw*, 599.

*Same; Knowledge of Defect in Injured Party.*—Knowledge by a pedestrian of a defect in a sidewalk or street does not affect his right to use such walk or street, nor to recover for injuries caused by the defect, unless negligent in the manner of travelling thereon, where the city charter requires that it keep its walks and streets in safe condition.—*Ib.* 599.

*Same; Instructions.*—The defendant set up by plea that there was about seven feet of the sidewalk from the hole thereon to the abutting property line that was safe for pedestrians and that the plaintiff contributed to her injury by failing to

## MUNICIPAL CORPORATIONS—Continued.

use the safe way and choosing the unsafe way, but the evidence failed to establish the plea. Held not reversible error to charge that if the sidewalk was not safe for about seven feet from the inside of the hole to the property line, for the passage of pedestrians, the defendant's plea of contributory negligence fails.—*Ib.* 599.

## 2. Violation of Ordinances.

*Municipal Corporations; Ordinances; Violation; Prosecution.*—

The statement of a cause of complaint filed by the city attorney in the appellate court does not supply the defect arising from a failure to file and furnish on demand of defendant a written complaint in the police court.—*Mayor & Aldermen of Birmingham v. O'Hearn*, 307.

*Same; Written Complaint; Sufficiency.*—The entry by a police judge on his docket of the charge against one prosecuted for a violation of a city ordinance, cannot take the place nor perform the office of a written complaint charging the violation.—*Ib.* 307.

*Same.*—Under the common law, by the statutes, and under the Constitution, one is entitled to a written complaint setting forth the charge, whether the prosecution is a criminal offense of a civil action or partakes of the nature of both.—*Ib.* 307.

*Same; Waiver.*—A person charged with the violation of a municipal ordinance, waives his right to demand a written complaint if he proceeds to trial in the police court without making such demands.—*Ib.* 307.

*Same.*—A city is not liable for the costs of the prosecution on the acquittal of one charge with the violation of the city ordinance in an appellate court.—*Ib.* 307.

## 3. Ordinances.

*Municipal Corporations; Ordinances.*—An ordinance forbidding the operation of steam engines, planing mills, foundries, blacksmith shops, etc., within the city limits, without first obtaining the consent of the Council, is invalid, in that it fails to prescribe a uniform rule of action but reserves to the Council the right to grant or withhold the privilege arbitrarily.—*City Council of Montgomery v. West*, 311.

## NAME.

*Name; Middle Initial.*—Letters of administration designating the intestate as "C. L. C.," are admissible in evidence, although intestate's correct name was "C. C.," the insertion of the middle initial being surplusage.—*Ala. Steel & Wire Co. v. Griffin*, 423.

*Names; Identity.*—The identity of the administrator, the intestate and of the cause of action being shown a release was properly admitted in evidence in which the name of the deceased was given as "Laurine Schuler," although the action was by the administrator of Laurine Schuler.—*Loveman v. Birmingham Ry. L. & P. Co.*, 515.

## NEW TRIAL.

See Appeal and Error, § 2.

## NEGLIGENCE.

See Carriers; Contributory Negligence; Master and Servant; Railroads; Street Railways.

*Negligence; Pleading; Complaint.*—A complaint which avers negligence in general terms, and then attempts to set out the particular acts constituting the negligence, without more, is demurrable, unless the acts so specified, in themselves, constitute negligence as a matter of law.—*Johnson v. Birmingham Ry. L. & P. Co.*, 529.

*Negligence; Discovered Peril; Contributory Negligence.*—Counts which allege negligence of defendant's servants after the discovery of the peril of the intestate, are counts in simple negligence, and subject to pleas of contributory negligence.—*Id.* 529.

*Same; Contributory Negligence; Knowledge of Peril.*—Contributory negligence when pleaded as a defense to a complaint which counts on defendant's negligence after discovery of the peril, must show that the negligent act of the person injured, was committed by him with knowledge of his peril.—*Id.* 529.

*Negligence; Pleading; General Averment of Wantonness.*—A general averment of wantonness or wilfulness will authorize any proof on that subject, in an action for negligence.—*Bradley v. L. & N. R. R. Co.*, 545.

*Municipal Corporations; Negligence; Personal Injury; Proximate Cause; Complaint.*—A complaint is insufficient which alleges that defendant negligently permitted a large body of water to collect in a highway; that plaintiff's horse fell in the water and that to save him plaintiff was compelled to get out into the water to unhitch the horse so as to enable him to get up, and that while doing so the horse knocked plaintiff down into the water; that on arising plaintiff was compelled to remain standing in the water to re-hitch the horse, and as a result thereof he caught a severe cold, as such complaint shows that the defendant's negligence was not the proximate cause of the injury, and that the injury resulted from a subsequent intervening cause.—*Crowley v. City of West End*, 613.

## OVERRULED CASES.

*Bradford v. The State*, 146 Ala. 150—by *Bradford v. The State*, 1.

## PARTNERSHIPS.

## 1. Contract.

*Partnership; Contract; Communion of Profit and Loss.*—Under a contract by which one party put \$100.00 in to the business to be applied to certain indebtedness, both parties were to work together for the interest of the business, and the profits to be divided one-third to each party and one-third to go to the liquidation of certain debts, such parties were partners *inter sese*, although by the same contract one was regarded as the owner of the business and was to remain in control of the business until the formation of a corporation contemplated by the contract.—*Brooke v. Tucker*, 96.

## 2. Accounting.

*Same; Accounting; Dissolution; Receivers.*—The allegations of the bill that the defendant partner was insolvent, and that he had collected money due the firm which he had appropriated

**PARTNERSHIPS—Continued.**

to his own use without making entry thereof on the partnership books, and without acquainting his partner of the facts, are sufficient when supported by proof to warrant a decree of dissolution and the appointment of a receiver.—*Brooke v. Tucker*, 96.

**3. Title to Property of.**

*Same: Title to Partnership Property.*—The fact that under the contract of partnership the respondent partner has the legal title to the partnership property, is no obstacle to the appointment of a receiver, when such partner has converted profits to his own use in which complainant partner had an interest and to which such complainant partner had contributed money.—*Brooke v. Tucker*, 96.

**PAYMENTS.**

*Payments; Application; Legal and Illegal Claims.*—Where a foreign corporation, which had not complied with Section 232 of the Constitution, sold goods to a buyer and shipped a part of them from its warehouse in Alabama to a point outside of the State, and the balance to the buyer's place of business in Alabama; and the buyer made payment, without directing the application thereof, in an amount more than enough to pay for the goods shipped outside the State, such payments must be applied to such debts as the debtor was legally bound to pay, and the foreign corporation had no right to apply the payments to the extinguishment of the claim that was illegal, even conceding that the Constitution did not apply to the sale of the goods shipped outside of the State.—*Armour Packing Co. of La. Ltd. v. Vinegar Bend Lumber Co.*, 205.

*Payment; Invalidity of Note Given as Evidence of Debt.*—The creditor's right to sue on the debt is not affected by a note given for the pre-existing debt, even if the note was obtained through fraud.—*Allen, et al. v. Caldwell, Ward & Co.*, 293.

**PEDIGREE.**

See Evidence, § 7.

**PLEADINGS.**

For pleadings in particular actions and crimes, see appropriate titles.

**1. Departure.**

*Pleading; Departure.*—It is not a departure to add by amendment counts on a special contract to counts on the common count, where such special contract is the foundation of the action on the common count.—*Owensboro Wagon Co. v. Hall*, 210.

**1½. Change of Parties.**

*Pleading; Amendment; Change of Parties.*—Since a tenant in common, although entitled to only an undivided interest in land, may try the title thereto, it is not an amendment working an entire change of parties to permit plaintiff to strike from the complaint the words "individually and as guardian for a lunatic, and for the use of said lunatic" co-tenant.—*Henry v. Frolichstein*, 330.

PLEADING.—*Continued.*

## 2. Replication.

*Pleading; Replication.*—To be good a replication must answer every material allegation of the plea.—*Owensboro Wagon Co. v. Hall*, 210.

*Pleadings; Stating Conclusions.*—A replication stating merely that defendant waived a provision of the contract, without stating facts showing such waiver, is bad as stating a conclusion.—*Western U. Tel. Co. v. Heathcoat*, 623.

## 3. Motion to Strike.

*Same; Motion to Strike; Demurrer.*—Pleas that are neither prolix, irrelevant or frivolous, must be tested by demurrer, and not by motion to strike.—*Owensboro Wagon Co. v. Hall*, 210.

*Same; Striking Out Matter.*—Where the recovery is sought for speculative damages, in an action on the contract, and this appears from the complaint, motion to strike from the complaint that portion relating to such damages was the proper method of reaching the objectionable matter; or the objection may be taken advantage of by requested instructions or by objection to evidence.—*Byrne Mill Co. v. Robertson*, 273.

## 4. Reference by one count to another.

*Pleading; Reference by One Count to Another.*—The first count contained an averment of the assignment of the contract, but the second did not. The second count adopted by reference the contract set out in the first count, but did not adopt averment of assignment of contract set out in the first count. Held, demurrable for failure to do so.—*Byrne Mill Co. v. Robertson*, 273.

*Pleadings; Count; Incorporation of Averments of Preceding Counts.*—The averments of a former count may be incorporated in a subsequent count by being therein expressly referred to.—*Wolf v. Smith*, 457.

*Same; Aider by Pleadings not in the Record.*—Reliance can not be had upon pleadings to which demurrer has been sustained, and which was, therefore, out of record, to sustain other pleading that refers for its facts to the pleading out of the record.—*Western U. Tel. Co. v. Heathcoat*, 623.

## 5. Abatement.

*Pleading; Pleas in Abatement; Time for filing.*—After plaintiff had amended his complaint by striking out the individual defendant as a party defendant, the non-resident corporation defendant should have been allowed to file its plea in abatement, setting up the want of jurisdiction of the court to hear and determine the cause.—*Eagle Iron Co. v. Malone*, 367.

## 6. Amendment.

*Pleading; Amendment.*—Under the statute an amendment which does not work an entire change of parties, or introduce a new cause of action, is allowable.—*Montgomery Traction Co. v. Fitzpatrick*, 511.

*Pleading; Amendment; Declaration; Carrier; Ejection of Passenger.*—The complaint originally alleged that plaintiff was wrongfully ejected from defendant's car, and the amendment allowed was a count alleging that while a passenger on defendant's car, plaintiff applied to defendant's conductor for a transfer to another line of cars of defendant, and was given

**PLEADING.**—*Continued.*

a transfer so negligently torn off that it could not be used, and by reason thereof would not be received, and by reason thereof plaintiff was ejected from said other car. Held, properly allowed.—*Id.* 511.

7. Waiver of Objection to.

*Pleading; Pleas; Objections; Waiver.*—Where an objection is not raised by demurrer that the pleaded acts of contributory negligence were alleged in the alternative, objection thereto is Waived.—*Johnson v. Birmingham L. & P. Co.*, 529.

8. Time of Filing.

*Pleading; Dilatory Pleas; Time of Filing.*—Rule 12 of practice in circuit and inferior courts of common law jurisdiction, is inapplicable to a plea in abatement which is in substance an amendment of former pleas filed in time, to which demurrers had been sustained and leave granted to amend.—*Abraham Bros. v. So. Ry. Co.*, 547.

**PRINCIPAL AND AGENT.**

1. Authority of Agent.

*Principal and Agent; Authority of Agent; Superintendent.*—One who is superintendent only of the lime works of his employer, has no authority by virtue of such agency to authorize the cutting of a ditch across the road over his employer's property.—*Dunn & Lallande Bros. v. Gunn*, 583.

*Principal and Agent; Power of Agent; Undisclosed Limitation on.*—A waiver by the head man and general manager of its local office of the conditions in the contract that the company will not be liable unless a written claim for damages is presented within sixty days, is binding on the company, in the absence of knowledge on the part of the person having the claim of a limitation upon the authority of such officer or agent imposed by the company.—*Western U. Tel. Co. v. Heathcoat*, 623.

2. Evidence of Agency.

*Principal and Agent; Evidence of Agency; Testimony of Agent.*—One sending a telegram cannot prove by his testimony showing that he delivered the message for the benefit of the addressee, that he acted as agent of the addressee.—*Western U. Tel. Co. v. Heathcoat*, 623.

*Principal and Agent; Evidence of Agency.*—For the purpose of showing the authority of F. to present plaintiff's claim to defendant for damages, it is competent to show that plaintiff placed her claim in the hands of F. for collection, and that F. orally presented the claim.—*Id.* 623.

**PRINCIPAL AND SURETY.**

1. Liability of Surety for.

*Principal and Surety; Condition of Liability.*—An instrument addressed to no one in particular, and signed by the defendant, stating that L. Bros., had contracted to build a house for defendant, and that any lumber used in its construction, to the amount of two hundred dollars, would be paid by the defendant at the time of first payment on house on presentation of an order from L. Bros., imposes no liability on the signer of the order where no order was obtained and presented be-

PRINCIPAL AND SURETY—*Continued.*

fore such first payment, and where the house was completed and L. Bros., paid in full before the signer of the instrument was informed that plaintiff had furnished any lumber.—*Bay Shore L. Co. v. Donovan*, 232.

## PUBLIC LANDS.

*Public Lands; Swamp Lands; Conveyance by the State.*—The State was without authority to issue a patent to swamp and overflow lands under Acts 1861, p. 2, until such lands had been patented by the federal government to the State, or certified by authority of the State as belonging to it.—*Henry v. Brannan*, 323.

## QUIETING TITLE.

*Quieting Title; Pleas.*—Where the bill is filed under Section 809, Code 1896, the answer should state the requirements provided by Section 811, and pleas are not permissible.—*Kinney v. Steiner Bros.*, 104.

*Same.*—Where the bill alleges the specific facts required by Section 809, it is unnecessary to traverse such facts, even if permissible, a point not decided.—*Ib.* 104.

*Quieting Title; Venue; Pleading.*—Though the bill does not allege the residence of parties, the allegations that the premises in controversy is in the county in which the suit is brought is sufficient to give the court jurisdiction, under section 676, Code 1896.—*City Loan & Banking Co. v. Poole*, 164.

*Same.*—Where the complainant is a resident of the county and the defendant enters an unconditional appearance, it is immaterial that the bill fails to allege the residence of the parties.—*Ib.* 164.

## RAILROADS.

See Street Railways; Carriers, Master and Servant; Negligence.

## 1. Injury to Person on Track.

## (a) Complaint.

*Railroads; Persons on Track; Death; Complaint.*—A complaint which avers that the cars were negligently operated, in that, though the night was dark, they did not have a sufficient headlight and were run rapidly, which negligence proximately caused the intestate's injuries and death, does not contain allegations constituting negligence as a matter of law, and is demurrable.—*Johnson v. Birmingham Ry. L. & P. Co.*, 529.

## (b) Evidence.

*Railroads; Persons on Track; Trespassers; Discovery of Peril; Evidence.*—The evidence in this case examined and held insufficient to justify a finding that decedent was crossing or walking down the track or laying thereon at the time of the accident, or that the motorman had actual knowledge of intestate's peril in time to have avoided the injury by the exercise of preventive effort.—*Johnson v. Birmingham Ry. L. & P. Co.*, 529.

*Same.*—A railroad company is not liable for the death of a person killed by a car while trespassing on the right of way at night, unless it is shown that the motorman had actual knowledge of his peril and could have avoided the same.—*Ib.* 529.

*Same; Pleading; Burden of Proof.*—The plea of the general issue or not guilty, as an answer to a complaint for killing intestate,



RAILROADS.—*Continued.*

a trespasser on the track, puts in issue all the material allegations of the complaint, including the allegation of the discovery of intestate's peril by defendant's motorman in time to have avoided the accident, by the employment of preventive effort and the failure to employ the same, and cast the burden on the plaintiff of proving such allegations.—*Ib.* 529.

## (c) Contributory Negligence.

*Railroads; Injuries to Persons on Track; Contributory Negligence.*—Plaintiff was struck by a locomotive running backward, while standing at a point on the right of way about thirty feet from a regular crossing, and not at a place where people frequently cross. Held, she was guilty of contributory negligence to defeat her right of recovery.—*Bradley v. L. & N. R. R. Co.*, 545.

## 2. Operation.

## (a) Setting out Fire.

*Railroads; Setting Fire; Negligence; Evidence.*—The plaintiff made a prima facie case raising the presumption of negligence of the defendant in setting fire among the stubble. The defendant made full proof of the proper equipment and handling of its engine, thus shifting the burden back to the plaintiff. Held, evidence, that a quarter of a mile from the place of the fire, and while going up grade, the locomotive emitted a great deal of sparks, and that several fires during a number of years were occasioned by sparks from defendant's engine, was not sufficient to raise a conflict in the evidence as to the proper equipment and handling of the locomotive.—*Farley, et al. v. Mobile & O. R. R. Co.*, 557.

## (b) Cattle Guards.

*Railroads; Construction; Cattle Guards.*—Under Section 3480, Code 1896, one not the owner of land cannot sue for damages for failure to place and maintain cattle guards on such land, nor is he entitled to recover damages caused by hogs trespassing thereon that enter his land through a cattle guard not on his land.—*Central of Ga. Ry. Co. v. Sturgis*, 573.

*Action; Complaint; Demurrers.*—A complaint for damages under Section 3480, Code 1896, which alleged damages by reason of defendants failure to repair the cattle guards on plaintiff's farm, but which fails to allege that plaintiff is the owner of the land, or that defendant ever erected cattle guards thereon, is subject to demurrer.—*Ib.* 573.

*Same.*—A complaint which averred the construction of cattle guards by defendant, the ownership in the plaintiff of the lands during a given time, when defendant was operating a railroad through such land, failure to keep the gap in repair after demand by plaintiff on defendant's agent and damages resulting therefrom, is not subject to demurrer for failing to allege ownership in the land when the injuries occurred, as a departure from the original cause, or as failure to aver notice to defendant's agent, or as failing to sufficiently describe the land.—*Ib.* 573.

## 3. Injury to Goods and Animals.

*Railroads; Injury to Animals; Negligence; Jury Question.*—Whether defendant was guilty of negligence in failing to stop

**RAILROADS.—Continued.**

the train after those in charge of the same discovered that the mules were frightened, and before they backed the wagon against the train and caused the injury, was a question for the jury.—*L. & N. R. R. Co. v. Mertz, Ibach & Co.*, 561.

*Same; Instructions.*—A charge asserting that if defendant was negligent in failing to stop the train, after its servants discovered the peril, then plaintiff would be entitled to recover unless the jury were reasonably satisfied of the truth of either of defendant's pleas of not guilty by reason of contributory negligence, fails to require that the negligence hypothesized was the proximate cause of the injury, and is erroneous.—*Id.* 561.

**RECEIVERS.****1. Appointment.**

*Receivers; Premature Appointment; Objections; Waiver.*—Although defendant partner submitted demurrers to the application for a receiver and filed affidavits against the appointment and thereafter appealed to the chancellor from the order of the register appointing the receiver, he waived his right to insist that the appointment was premature, because appointed by the register before answer filed, when he filed his answer before the chancellor as part of the proofs against the application, on appeal to the chancellor.—*Brooke v. Tucker*, 96.

**RECORDS.****Substitution of Lost Records.**

*Records; Supplying Lost or Destroyed Records.*—Section 2647, Code 1896, is declaratory of the law as it already existed of the inherent power of the courts to substitute original papers or records which are lost or destroyed, in pending civil causes.—*Ala. City G. & A. Ry. Co. v. Ventress*, 658.

*Same; Procedure; Review; Acts Reviewable.*—The action of the court on pleadings for the substitution of lost or destroyed records in pending civil cases is not revisable upon appeal from an order on the pleadings. Such action can be reviewed only upon proper exception taken on appeal from final judgment in the cause.—*Id.* 658.

**RELEASE.**

*Release; Pleading; Sufficiency.*—A plea which alleges that a certain sum was paid by the defendant to the administrator who accepted the same in full discharge of the cause of action alleged is sufficient as a plea of release.—*Loveman v. Birmingham Ry. L. & P. Co.*, 515.

*Release; Pleading; Issues; Evidence; Admissibility.*—The plea was a settlement with the administratrix of the deceased; the replication alleged that the settlement was fraudulent and the administratrix incompetent to make it. Held, that to prove the averments of the replication it is competent to show that the defendant had, before the settlement, offered to settle with witness, as attorney for a much larger sum, which fact was communicated to the administratrix before the settlement; but not competent evidence on the issue of the liability of defendant.—*Id.* 515.

## RIDING BICYCLE ON SIDEWALK.

*Municipal Corporation; Use of Sidewalks; Personal Injury.*—A person riding a bicycle on a sidewalk is responsible in damages to any pedestrian who is injured thereby, while in the proper exercise of his rights, although there is no ordinance prohibiting the riding of bicycles on the sidewalk, and a complaint which alleges that the plaintiff was injured by being run into by the defendant who was riding a bicycle on a sidewalk in the city is sufficient, without any other allegation of negligence.—*Fielder v. Tipton*, 608.

## RULES OF PRACTICE.

Rule 12. Circuit C. P. *Abraham Bros. v. So. Ry. Co.*, 547.

## SALES.

See Contracts; Logs and Logging.

## 1. Distinguished from Other Transactions.

*Sales; Distinguished from Other Transaction; Evidence.*—On the issue as to whether the wagons were sold defendant, or whether defendant held them as plaintiff's agent, a warehouse receipt for the wagons taken by the defendant after the commencement of the suit, is admissible as a circumstance to be considered by the jury.—*Owensboro Wagon Co. v. Hall*, 210.

## 2. Contract of.

*Sales; Contracts; Construction; Payment.*—A contract provided for the sale of certain lumber to be delivered at S. and stating the price to be paid per thousand as fast as loaded on cars at end sixty days negotiable bankable paper. Held, the contract was not void for indefiniteness on the theory that no obligation was imposed on the purchaser to load the cars at M., nor was the phrase sixty days negotiable bankable paper meaningless, as the law would imply a reasonable time in the absence of any provision as to the time of payment.—*Byrne Mill Co. v. Robertson*, 273.

## 3. Conditions Precedent and Subsequent.

*Same; Conditions Precedent.*—Where the contract declared that the party of the first part agreed to manufacture, sell and deliver lumber to the party of the second part from time to time, and the party of the second part is obligated to receive the lumber, and the price to be paid per thousand feet was stated, the stipulation to deliver was an independent covenant, and a condition precedent to the duty of payment, and a failure or refusal to deliver would constitute a breach for which an immediate action would lie.—*Byrne Mill Co. v. Robertson*, 273.

*Same; Payment.*—The provision of the contract by which the first party agreed to manufacture and sell lumber to the second party at a certain sum per thousand feet as fast as loaded on the cars at M., for all lumber dressed or rough, "and all dry kiln lumber shipped by the second part previous to the erection and operation of the mill for planning by the second party," does not render the contract incomplete, in that it fixes the price for such lumbers as might be shipped previous to the erection of the mill; the phrase "previous to the erection and operation" is limited to the dry kiln lumber shipped, and not to all the lumber dressed or rough.—*Id.* 273.

SALES—*Continued.*

## 4. Breach.

*Same; Breach; Waiver.*—The right of a seller to terminate a contract of sale upon the refusal of the purchaser to perform by payment for goods already delivered, may be waived by words or by conduct.—*Byrne Mill Co. v. Robertson*, 273.

## SCHOOLS AND SCHOOL DISTRICTS.

## 1. Funds.

*Schools and School Districts; School Funds; Investment; Retroactive Statutes; Curative Acts.*—If no contract or vested rights are violated or impaired the ultra vires act of the school commissioner in making a loan on real estate is remedied by an act of the legislature ratifying the same, where the legislature has power in the first instance to authorize school commissioners to make a loan on real estate.—*Courtner v. Etheridge, et al.*, 78.

## 2. Officers.

*Schools and School Districts; Offices; Ultra Vires Contract; Curative Act.*—Sections 3 and 4 of the Act of March 2, 1901 (Acts 1900-01, p. 2070) ratify the ultra vires act of the commissioner in making the loan in this instance, and empowers their successors, the trustees, to enforce the loan contract.—*Courtner v. Etheridge, et al.*, 78.

## SELF DEFENSE.

See Homicide.

## SENTENCE.

See Criminal Law.

## SERVICE OF PROCESS.

See Corporations.

## STATUTES.

See Constitutional Law.

## 1. Amendments.

*Statutes; Amendments; Constitutional Requirements.*—Article 4, Sec. 2, Constitution 1875, applies only to amendments, which without the presence of the original act, are unintelligible, and hence, the act of March 2, 1901 (1900-01, 2070) is not repugnant to or violative of the Constitution, either as to its amendment or that it shall contain but one subject which shall be clearly expressed in the title.—*Courtner v. Etheridge, et al.*, 78.

## 2. General, Special and Local.

*Statutes; Constitutional Provisions; General and Special Statutes.*—Local Acts 1903, p. 615, is violative of Sec. 105 of the Constitution of 1901, and the issuance of refunding bonds by the city was properly had under the provisions of the general statutes, Acts 1903, p. 71.—*City Council of Montgomery v. Reese*, 188.

## 3. Constitutional Requirements.

*Statutes; Titles of Act; Constitutional Requirement.*—The title of the act was: "An act to amend Section 1 of an act entitled 'An act to amend Section 1 of an act entitled an act to estab-

STATUTES—*Continued.*

lish a new charter for the city of E.'" Held, a sufficient compliance with Section 45 of the Constitution of 1901.—*Mayor etc. of Ensley v. Cohn*, 316.

4. Notice Requisite to Passage of Local.

*Same; Local Laws; Notice of Intention to Apply For; Sufficiency.*—Notice in this case examined, and it is held that the substance of the proposed law, which was the altering or rearranging of the boundaries of the city, was sufficiently set forth in the notice, and the act is valid, although the notice stated the proposed territorial lines which were not followed, but were changed in the act as passed.—*Mayor, etc. of Ensley, v. Cohn*, 316.

5. Construction and Validity.

*Same; Validity; Partial Invalidity.*—Where part of an act which is objectionable on constitutional ground, can be eliminated without affecting the purpose of the act, or its integrity, it will be done, and the valid and unobjectionable part be permitted to stand.—*Mayor, etc. of Ensley v. Cohn*, 316.

STREET RAILWAYS.

See Carriers; Master and Servant; Railroads.

1. Injury to Persons on Track.

(a) Evidence.

*Street Railroads; Injuries to Pedestrians; Action; Evidence.*—It having been shown by defendant's motorman that when he first saw deceased he was walking in a path two or three feet from the side of the track, it was proper to permit him to state whether the car would have struck deceased in passing him at that distance from the car.—*Birmingham Ry. L. & P. Co. v. Randle*, 539.

2. Operation.

*Street Railroads; Operation; Regulation.*—Section 5368, Code 1896, does not apply to a street railway.—*Dean v. The State*, 34.

TAXATION.

*Taxation; Assessment to two Parties; Payment by One; Effect.*—

When lands are assessed to two different people for the same year, and one of such persons pays the taxes on such land for that year, the lien for taxes as to that land for that year is discharged, and no collection can be had under the other assessments.—*Pickler v. The State*, 669.

TELEGRAPHS AND TELEPHONES.

*Telegraphs and Telephones; Operation; Messages; Relationship; Damages; Mental Suffering.*—A grandson is within that near relationship that will authorize a recovery for mental pain and anguish occasioned by the failure to deliver a message stating that the grand father was dying and to come at once.—*Western U. Tel. Co. v. Prevatt*, 617.

*Same; Agent of Sender; Stipulation as to Claim for Damages.*—The sender, who could neither read nor write, went into the telegraph office and procured one of the employes to write a telegram for him and sign his name thereto. The message was written on the usual blank form and was read back to

TELEGRAPHS AND TELEPHONES—*Continued.*

the sender. Held, the employe was the agent of the sender in writing the message so as to bind him to a stipulation on the form requiring the filing of his claim for damages within a certain time.—*Ib.* 617.

*Same; Limiting Liability.*—In the absence of fraud, one who procures another to write a message upon one of the forms for that purpose and sign his name thereto without dissent, is estopped to deny the binding force of a notice on such form limiting the company to liability for damages to claims presented within thirty days after the message is filed for transmission.—*Ib.* 617.

*Same.*—Although the sender, who was the agent of the plaintiff sendee, could not read and write, and procured another to do so for him, the plaintiff sendee, in the absence of fraud is bound by the stipulation limiting liability to damages on claims filed within thirty days from the day the message was filed for transmission.—*Ib.* 617.

*Telegraphs; Acceptance of Message for Transmission; Conditions; Waiver.*—The Company may waive the condition in the contract under which it sends a message that it will not be liable for damages growing up out of a failure on its part unless the claim is presented within sixty days after the filing of the message for transmission.—*Western U. Tel. Co. v. Heathcoat*, 623.

*Same.*—The waiver of the conditions that the company will not be liable for damages growing up out of its failure to transmit a message unless the claim is presented in writing within sixty days, may rest in parol.—*Ib.* 623.

*Telegraphs; Failure to Deliver Message; Actions; Parties.*—Unless the person delivering the message for transmission acts for or on behalf of the person to whom it is addressed, such person is not a party to the contract for transmission and delivery of the message so as to be entitled to maintain an action for its breach.—*Ib.* 623.

*Telegraphs; Failure to Deliver Message; Damages; Mental Suffering.*—The relation of brother and sister is such as to authorize recovery for mental suffering for failure to deliver telegram.—*Ib.* 623.

## TENANCY IN COMMON.

## 1. Adverse Possession.

*Tenancy in Common; Adverse Possession; Hostile Character.*—

Where four persons own land as tenants in common, and two of them agree among themselves upon a division of the land between themselves, no change of title is effected, and the continued possession of one part of the land by one of the parties to the division, without actual ouster of his co-tenants, does not constitute an adverse holding as to them.—*Courtner v. Etheridge, et al.*, 78.

*Same; Judicial Sale; Notice of Change of Ownership.*—The undivided interest of one of the tenants in common was sold under execution at a sheriff's sale. The share was purchased by a co-tenant, who conveyed it to the wife of the execution co-tenant. The conveyance to the wife was not recorded and she and her husband continued to occupy the land just as before the sale of the husband's interest, and its conveyance to her. Held, there was not such notice of change of ownership

**TENANCY IN COMMON—Continued.**

or possession as to entitle the wife to claim any right by adverse possession.—*Ib.* 78.

**3. Redemption by Co-tenant.**

*Tenant in Commn; Sale on Foreclosure; Redemption by Cotenants.*—While a co-tenant cannot by redeeming from a mortgage sale invest himself with the absolute indefeasible title to the joint property, the redemption inuring to the benefit of all, yet the other co-tenants must within a reasonable time elect to contribute if they would reinstate their title.—*Savage, et al. v. Bradley*, 169.

*Same; Laches of Co-tenant.*—Under ordinary circumstances, two years is a reasonable time for the exercise of the right of election to contribute and reinstate their title by co-tenant, where other co-tenants have redeemed from mortgage sale, therefore where the co-tenant did not attempt to exercise this right for nearly ten years after the redemption by the other co-tenant, such laches lost them the right to elect.—*Ib.* 169.

**TRADE MARKS.**

*Trade Marks; Right to Protection.*—When one has adopted a trade mark to identify his product, and has, by his skill and labor, created a valuable market therefor and induced public confidence in the superior quality of his goods, he is entitled to protection, so long as he deals honestly with the public, against those who attempt to appropriate his trade mark, and use it on other goods of the same class, without right.—*Epperson & Co. v. Bluthenthal, et al.*, 125.

*Same; Suit to Restrain Infringement; Jurisdiction.*—The jurisdiction of equity to restrain infringement of a trade mark is based on the right of property in the complainant, and its fraudulent invasion by another. Its use is, the prevention of fraud on him and the public, so the person invoking equity's aid must himself be free from fraud. A material misrepresentation as to the person manufacturing the article, or as to the material composing it, deprives such one of right of relief.—*Ib.* 125.

*Same.*—Where the evidence showed that the contents of the bottles, on which was used the trade mark adopted to identify the whiskey manufactured, bottled and sold by complainant, was greatly inferior to what was indicated by the labels and lettering, and that such labels and lettering was to induce the public to believe that the quality of the whiskey was greatly superior to what it really was, equity will leave the parties where it finds them.—*Ib.* 125.

**TRESPASS.**

**1. Possession.**

*Trespass; Right of Action; Plaintiff's Possession.*—The fact that plaintiff's tenant, without notice to plaintiff, attorned to the defendant, did not destroy plaintiff's possession so as to preclude her from maintaining an action of trespass.—*Buford v. Christian*, 343.

*Trespass; Possession of Plaintiff at Time of Trespass; Evidence.*—The plaintiff introduced no evidence of possession except a judgment in ejectment, and as that relates only to the time of beginning the ejectment suit, and as there was no evidence of trespass except prior to the date of the beginning

of the ejectment suit, plaintiff cannot recover for the trespass.—*Henry v. Davis*, 359.

## 2. Damages.

*Trespass; Damages; Nominal Damages.*—The grantee in a conveyance owning the standing timber on the land, who removed the timber after the expiration of the time limit fixed by the conveyance for such removal, but in removing the timber did no appreciable damage to the soil or to the possession, is not liable for more than nominal damages in trespass quare clausum.—*C. W. Zimmerman Mfg. Co. v. Daffn*, 380.

## TRIAL.

### 1. Instructions.

#### (a) Effect of Evidence.

*Same; Instructions; Effect of Evidence.*—A charge which asserted that unless there was other evidence than that of the person assaulted, to convince them beyond a reasonable doubt that the defendant committed the offense they could not convict the defendant and should not find her guilty, is a charge upon the effect of evidence and is properly refused.—*Williams v. The State*, 4.

*Trial; Instruction; Effect of Evidence.*—A charge that there is no evidence of a defect in the defendant's appliances, and that under the evidence plaintiff's injuries were due to an accident for which defendant is not responsible, invades the province of the jury and is properly refused.—*Southern C. & C. Co. v. Swinney*, 403.

*Same; Instructions; Credibility of Witness.*—A charge asserting that if the jury believed that a witness had willfully sworn falsely to any material fact, they might, in their discretion, disregard his testimony is proper.—*Ala. Steel & Wire Co. v. Griffin*, 423.

*Trial; Instructions; Statement of Parties Contentions.*—It was not error for the court, in giving its oral charge, to state plaintiff's contentions to the jury.—*L. & N. R. Co. v. Britton*, 552.

#### (b) Covered by Instructions given.

*Criminal Law; Instructions Covered by Instructions Given.*—It is not error to refuse instructions which are substantially covered by requested instructions already given.—*Creagh v. The State*, 8.

*Same.—Instructions Covered by Instructions Given.*—It is not error to refuse an instruction covered by an instruction given.—*Young v. The State*, 16.

*Same; Instructions Covered by Instructions Given.*—The court will not be put in error for refusing instructions substantially covered by instructions given.—*Woodstock Iron Works v. Kline*, 391.

#### (c) Reasonable Doubt.

*Same; Reasonable Doubt.*—A well founded doubt is the same as a reasonable doubt.—*Creagh v. The State*, 8.

#### (d) Province of Court and Jury.

*Criminal Law; Trial; Instructions; Province of Court and Jury.*—It is not error to refuse to instruct the jury that they could consistently reconcile the statements of certain witnesses, as to confessions made by defendant to them that he cut deceased, with his innocence, as it is invasive of the province of the jury.—*Creagh v. The State*, 8.



TRIAL.—Continued.

*Same; Trial; Instructions; Invading Province of Jury.*—The charge asserting that if the jury believed beyond a reasonable doubt that the defendant cursed deceased and said to him he was going to kill him, and defendant said this as soon as deceased came in sight of him the evening of the shooting, and that defendant immediately after using the language shot deceased, then the defendant could not be acquitted under plea of self defense, is not error as invasive of the province of the jury. (DOWDELL, ANDERSON and DENSON, JJ., dissent to this proposition.)—*Logan v. The State*, 11.

*Same; Instructions; Province of Jury.*—Where the evidence tended to show a conspiracy between the defendant and his son to commit the offense charged, instructions which withdrew from the jury all consideration of the question of conspiracy, are properly refused.—*Ferguson v. The State*, 21.

*Same; Invading Province of Jury.*—An instruction asserting that the undisputed testimony showed that the administratrix executed a release on account of the death of decedent for a certain sum paid to her by defendant invaded the province of the jury; as did one asserting that the law presumed that the administratrix was of sound mind and capable of executing the release.—*Loveman v. Birmingham Ry. L. & P. Co.*, 515.

*Same.*—A charge asserting that on account of the release the jury must find the verdict for the defendant, unless each juror was satisfied that administratrix and defendant colluded to defraud the distributees, or that she was so mentally unsound as not to understand the nature of the release, not only exacts a too high degree of proof but is misleading.—*Ib.* 515.

*Same; Weighing Testimony; Duty of Jury.*—A charge that the jury is not bound to accept as true the testimony of any witness if they are reasonably satisfied of its truth, and in weighing the testimony of the witnesses the jury are expected to view the evidence in the light of their common sense and experience is erroneous; as is a charge calling the jury's attention to testimony without referring the credibility thereof to them.—*Ib.* 515.

*Trial; Instructions; Assumption of Fact.*—A charge for plaintiff postulating a finding in his behalf on a disbelief by the jury of defendant's evidence, assuming as a fact that plaintiff has made out his case, is properly refused.—*Farley, et al. v. M. & O. R. R. Co.*, 557.

(e) Directing Verdict.

*Criminal Law; Trial; Instructions.*—Where there was evidence tending to show a conspiracy between the son and the defendant to kill deceased, the general affirmative charge was properly refused to defendant, although there was conflict in the testimony as to the conspiracy.—*Ferguson v. The State*, 21.

*Trial; Direction of Verdict; Grounds.*—The defendant pleaded that in consideration of a stated amount paid by him to plaintiff, plaintiff released defendant from the damages for which the suit was brought, and plaintiff took issue thereon. The evidence established the release without conflict, and the defendant was entitled to the general charge.—*Tutwiler C. O. & I. Co. v. Wheeler*, 354.

(f) Ignoring Evidence and Defenses.

*Same; Trial Instructions; Ignoring Evidence.*—Where there was evidence tending to show a conspiracy between defendant and

TRIAL.—*Continued.*

his son to commit the homicide, an instruction predicated on an acquittal of defendant on a reasonable doubt of his presence aiding and abetting his son, pretermitted, as it does, all reference to a conspiracy, is properly refused.—*Ferguson v. The State*, 21.

*Trial; Instructions; Ignoring Defenses; Permitting Recovery for Causes not Counted on.*—The complaint alleging that the injury occurred while the plaintiff was boarding one of defendant's cars while the car was stationary at a regular stopping place for the reception of passengers, and was caused by the defendant negligently putting the car in motion when plaintiff was in a perilous position; and the defense being the general issue, and contributory negligence in attempting to board the car while in motion, in front of a trunk or box near defendants' track resulting in plaintiff's having run into the trunk or box causing the injury complained of, it was erroneous to instruct the jury that if there were two proximate and concurring causes at the time of the injury "for instance, if there was negligence in moving the car by the conductor when plaintiff attempted to board it, if that was negligent, if that was one of the causes, and if there was a trunk or box here, and that was another cause, and if both these causes, contributed to the injury, still plaintiff can recover, because he is not cut off by the fact of the box being there; as it ignores the plea of contributory negligence, and permits recovery for cause not alleged.—*Ala. City G. & A. Ry. Co. v. Bates*, 487.

*Same; Ignoring Evidence.*—The issue being whether a release was valid and there being evidence of the mental incapacity of the administratrix, a charge asserting that the legality of the settlement did not depend on the amount paid therefor, but that the law recognized the right to settle on such terms as they considered fair was erroneous as ignoring the evidence in the case.—*Loveman v. Birmingham Ry. L. & P. Co.*, 515.

*Same.*—An instruction asserting that there was no evidence that a representative of defendant besought the administratrix to make a settlement or attempted to prevail on her to make it was erroneous as invading the province of the jury and ignoring evidence.—*Ib.* 515.

(g) When reviewed.

*Same; Instructions; Review.*—Under Section 3327, Code 1896, this court will not consider instructions where the record fails to show that they were requested in writing, or that they were given or refused.—*Nelson v. The State*, 26.

(h) Applicability to Evidence and Pleading.

*Trial; Instructions; Application to Evidence.*—Where the evidence showed that the defendant's acts were not acts of adverse possession but were purely trespasses, it was proper to refuse an instruction to the effect that there should be a verdict for the defendant if he was in adverse possession of the lands.—*Buford v. Christian*, 343.

→ *Same; Conformity to Facts and Evidence.*—A requested instruction that although the jury might believe that the foreman ordered the employe to ride the cars down, yet if such order was not the cause of the accident, and the employe's death resulted from such other cause, plaintiff could not recover, authorized

**TRIAL.**—*Continued.*

the jury to speculate as to the cause and was properly refused.—*Woodstock Iron Works v. Kline*, 391.

*Same*; *Applicability to Issues*.—A charge asserting propositions not raised by the pleading, or that go beyond the issues, is properly refused.—*Ib.* 391.

*Trial*; *Instructions*; *Applicability to Pleading*.—An instruction predicated upon a defect which was not alleged in either count of the complaint that went to the jury, was properly refused.—*Ala. Steel & Wire Co. v. Griffin*, 423.

*Trial*; *Instructions*; *Conformity to Issues*.—Where none of the counts submitted to the jury predicated negligence on signals given by one employe to another, an instruction based on the giving of signals was properly refused.—*Ib.* 423.

*Trial*; *Instructions*; *Burden of Proof*.—A charge asserting that upon the conditions named therein, plaintiff would be entitled to recover unless the jury were reasonably satisfied of the truth of either one of defendant's pleas, in effect, places the burden of proof of the plea of not guilty on the defendant.—*L. & N. R. R. Co. v. Mertz, Ibach & Co.*, 561.

(1) Character charges.

*Criminal Law*; *Instructions*; *Character of Accused*.—A charge asserting that defendant may offer proof of his good character, and that such proof taken in connection with all the evidence in the case, may be sufficient to create a reasonable doubt of the guilt of the defendant; and one asserting that proof of good character, in connection with all the other evidence, may generate a reasonable doubt, which entitled the defendant to an acquittal, even though without such proof of good character the jury would convict; both state correct propositions of law, and their refusal was error.—*Taylor v. The State*, 32.

(3) Misleading Instructions.

*Trial*; *Misleading Instructions*.—A charge asserting that if riding the cars down the incline was perilous and the jury should further find that the peril was obvious to the person riding them, he could not recover, is misleading and properly refused.—*Woodstock Iron Works v. Kline*, 391.

*Same*; *Misleading Instructions*.—A charge asserting that if the jury believed that intestate's parents did not know where he was getting the money they testified he sent to them, and if the jury did not believe that intestate was earning the money, in computing the measure of damages, they could not estimate the same as a basis, was misleading and properly refused.—*Ala. Steel & Wire Co. v. Griffin*, 423.

*Same*; *Misleading Instructions*.—Instructions misleading in their tendencies are properly refused.—*Birmingham Ry. L. & P. Co. v. King*, 504.

*Same*; *Misleading Instructions*.—A charge asserting that the jury would not be justified in finding that the release was not the act of the administratrix, unless they were reasonably satisfied not only that she was mentally weak but that she was mentally unsound, and that she did not at the time comprehend the release on account of such mental unsoundness; and one asserting that the amount paid in settlement of the release was immaterial unless the jury were convinced that the administratrix did not have sufficient mental capacity to make the settlement, or that she conspired with defendant to de-

## TRIAL.—Continued.

fraud the distributees of the estate; and another asserting that the law does not recognize mere mental weakness as incapacitating a person to make a contract, are each misleading, the issues being the competency of the administratrix to execute the release, and whether or not it was fraudulent to execute it.—*Loveman v. Birmingham Ry. L. & P. Co.*, 515.

## (k) Argumentative Instructions.

*Same; Argumentative Instructions.*—A requested charge that no duty rested on the foreman to instruct the employe about riding the cars down the incline, if the danger was obvious and the employe was sufficiently developed to understand the dangers, was argumentative and properly refused.—*Woodstock Iron Works v. Kline*, 391.

*Trial; Instruction; Argumentative Instruction.*—An instruction asked as an answer to argument of counsel, asserting that defendant had no absolute right to have the plaintiff examined to determine the extent of the injuries, was an argument and properly refused.—*Birmingham Ry. L. & P. Co. v. King*, 504.

*Trial; Argumentative Instructions.*—An instruction asserting that it was the policy of the law to favor private settlements; and one asserting that the jury would not be justified in finding that the administratrix conspired to defraud her grandchild merely because they believed that she was not of sound mind, are argumentative and might properly have been refused; the issue being whether the settlement was fraudulent and whether the administratrix was competent to make it.—*Loveman v. Birmingham Ry. L. & P. Co.*, 515.

*Same; Argumentative Instructions.*—An instruction is argumentative which asserts that the jury might consider, in determining whether the husband of the administratrix objected to the settlement, that he went alone to the office of the representative of defendant, that he witnessed the settlement and ratified it and took no steps to avoid it until he was sent for by attorneys; so also is one asserting that the jury in determining whether the administratrix entered into a conspiracy with defendant to defraud the distributees of the estate, might consider that the administratrix was a grandmother of the distributees, and that they lived with her and were supported by her and her husband.—*Ib.* 515.

*Same; Argumentative Instructions.*—An instruction that the jury in determining whether the administratrix was so mentally unsound as to be incapable of making the release, might consider the fact that she talked with her husband about her settlement before she agreed to make it and that she talked with others after making the settlement was argumentative and properly refused.—*Ib.* 515.

## (l) Abstract Instructions.

*Same; Abstract Instructions.*—A charge asserting that if the jury believe that in the natural course of events deceased would have spent all his earnings in maintaining himself during life, if he lived out his expectancy, plaintiff could not recover was properly refused as being abstract.—*Woodstock Iron Works v. Kline*, 391.

## (m) Incomplete Instructions.

*Trial; Instruction; Incomplete Request.*—A charge which is incomplete and unintelligible, is properly refused.—*Southern C. & C. Co. v. Swinney*, 403.

**TRIAL—Continued.**

**2. Order of Proof.**

*Criminal Law; Trial; Order of Proof.*—It is within the discretion of the trial court to permit the state to examine a witness on the main case after the defense had closed its case, and not reversible.—*Nicholson v. The State*, 61.

*Trial; Reception of Evidence; Exception; Time of Making.*—A receipt was proven and it was introduced in evidence without objection, and a witness testified that the payment was in full up to a certain time. Held, that a motion made at the conclusion of the evidence, to exclude the receipt and the witness' testimony, came too late.—*Bienville W. Supply Co. v. Heironymus Bros.*, 265.

*Trial; Reception of Evidence; Statement of Counsel as to Expected Proof; Exclusion of Evidence.*—Where the court properly admitted a deed as color of title upon statement of counsel that proof of possession under it would be made, if such proof is not made, the party objecting to its introduction should move to exclude it, if he desires to put the court in error.—*Henry v. Frolichstein*, 33a

**3. Conduct of Counsel on.**

*Same; Misconduct of Counsel; Argument to Jury.*—Where the defendant's counsel in argument to the jury said to them that they might consider the fact that the woman was accustomed to use such language, herself and that she boarded women of notoriously bad character for two or three weeks, it was not error to permit the solicitor to argue and state to the jury, "that if the woman was the vile bad woman, which the defendant says she is, why then did they not bring witnesses here to prove it. If she was a bad character don't you know that they would have brought witnesses here to prove it."—*Nicholson v. The State*, 61.

**4. Reception of Evidence.**

*Trial; Reception of Evidence; Waiver.*—The answer being responsive to the question and no objection having been interposed to the question, a motion to exclude evidence on the ground of irrelevancy or immateriality comes too late.—*So. C. & C. Co. v. Swinney*, 403.

*Same; Objection by Party Eliciting Evidence.*—The party who draws out evidence on cross examination, may not move to exclude such evidence.—*Ib.* 403.

*Trial; Motion to Exclude Evidence.*—Where there was no objection to the question or the answer thereto, and the evidence was relevant, a motion made to exclude such evidence, made at the close of the defendant's testimony, comes too late.—*Birmingham Ry. L. & P. Co. v. Wise*, 492.

**TRIAL OF RIGHT OF PROPERTY.**

See Attachment.

**TROVER AND CONVERSION.**

*Trover and Conversion; Detention of Property; Necessity for Demand.*—In the absence of a demand for the delivery of the property, the officer's retention of its possession was not a conversion, where the property taken by the officer under execution was released, and the mortgagor notified thereof.—*Wilson & Son v. Curry*, 368.

TROVER AND CONVERSION—*Continued.*

*Trover and Conversion; Right of Action; Title of Plaintiff; Assignment of Lien.*—The assignee of the lien of the party furnishing the labor acquires no title that will support trover or conversion for part of the crop.—*Farrow v. Wooley & Jordan*, 373.

*Same; Evidence; Admissibility.*—Testimony tending to show that the owner of the crop said he would see the debt of the laborer paid was admissible as a circumstance tending to corroborate the assignee of the laborer's lien that the owner did afterwards deliver and turn over the laborer's cotton to him in payment of the laborer's debt.—*Id.* 373.

*Same; Right of Action; Title of Plaintiff.*—Where the owner of the crop and the laborer divided the crop in accordance with the terms of the contract, and the part assigned to the laborer was delivered to the assignee of the laborer's lien in payment of the mortgage to them such assignee were entitled to maintain trover for taking the crop by a third person.—*Id.* 373.

*Same; Evidence; Admissibility.*—Testimony that the owner of the crop told the assignee of the laborer's lien to go and get the cotton for the payment of their claims against the laborer was admissible as tending to show that the owner had relinquished his right to the cotton and turned it over to such assignees, or to the laborer.—*Id.* 373.

*Same.*—It was competent to show by plaintiff that after the cotton had been taken from plaintiff and placed in defendant's warehouse that the owner of the crop said to plaintiff that plaintiff's bales of cotton were in the warehouse, as a circumstance tending to show that he considered that the cotton had been delivered to plaintiff under the mortgage.—*Id.* 373.

*Trover and Conversion; Title of Plaintiff.*—Where the cotton was raised under a crop contract by one furnishing the lands and teams and the other the labor, and such cotton was delivered by both parties to the contract to plaintiff for credit upon the account of the laborer, the plaintiff is entitled to maintain trover for the conversion of such cotton; and a delivery is shown when the evidence discloses that the owner and the laborer each directed one of the plaintiff's to get the cotton and apply it to the laborer's account.—*Id.* 373.

*Same; Instructions.*—A charge is correct which asserts that, in determining whether the cotton was delivered to plaintiffs the jury must look to all the evidence, and if they are reasonably convinced that the owner directed one of the plaintiffs to get the cotton, then the title to same passed to plaintiffs.—*Id.* 373.

*Same.*—A charge asserting that when the cotton was ginned it belonged solely to the owner of the crop, and that before plaintiffs can recover they must prove that they bought it from the owner, and the burden of proving this with reasonable certainty is on the plaintiffs, is incorrect and properly refused.—*Id.* 373.

## TRUSTS.

## 1. Relation.

*Same; Trust Relation of Executor to Legatee; Discharge as Executor; Legacy Unpaid.*—The final settlement by an executor of his accounts and his final discharge did not change the trust relation as between him and the legatee, as to the amount of the legacy remaining in his hands; nor did the

## TRUSTS—Continued.

payment by him of the amount of the legacy remaining in his hands to the residuary legatees, through a mistake, alter his trust relation to the legatee.—*Glennon v. Harris*, 236.

## 2. Liability of Trustee.

*Trusts; Liability of Trustee; Limitations.*—The executor of an estate agreed with a legatee under the will to pay her legacy in installments of ten dollars each per month, and thus created an express trust between them as to the fund. The executor paid two hundred dollars in such installment, and through mistake failed to pay the balance of the legacy. Held, the statute of limitations for six years did not begin to run against the claim for the balance, until after demand and refusal to pay.—*Glennon v. Harris*, 236.

## UNLAWFULLY RIDING ON TRAIN.

*Unlawfully Riding on Train; Evidence.*—Evidence in this case held sufficient to authorize a conviction for unlawfully being on train without consent of train operators with intent to be transported free.—*Gains v. The State*, 29.

*Criminal Law; Evidence; Burden of Proof; Negative Averments.* The burden of proving the negative averments of the affidavit that the person was not in the employment of the railroad and that he was riding without authority from the conductor or engineer is not upon the state, such facts being particularly within the knowledge of the defendant.—*Ib.* 29.

## VENDOR AND PURCHASER.

*Vendor and Purchaser; Bona Fide Purchaser; Notice; Possession as Notice.*—B. purchased real estate under a parol contract and paid the purchase price, the vendor agreeing to execute a deed and directed the purchaser to take possession, which he did on the day following. The day the purchase money was paid, the vendor received a conveyance from his vendor to the land. The purchaser continued in possession of the premises under his contract and while in possession his vendor conveyed the land to a third person. Held, the last conveyance was void as against the purchaser and his possession under the oral contract was notice to the other purchaser.—*City Loan & Banking Co. v. Poole*, 164.

*Vendor and Purchaser; Vendor's Lien; Effect of Taking Collateral Security.*—Where one sells land and takes personal collateral security as a pledge or mortgage, generally no lien for the purchase money rests on the land.—*Spears v. Taylor, et al.*, 180.

*Same; Waiver; Burden of Proof.*—Where a vendor's lien has been reserved on the land, the party asserting that such lien has been waived has the burden of proving it; but where a distinct security sufficient to operate as a waiver has been taken and this is shown, the burden is shifted to the vendor to prove a reservation of the lien.—*Ib.* 180.

*Same; Evidence.*—The vendor sold the land and took a note for part of the purchase price which described the land by government subdivisions and recited that it was given in part payment of the land. The note was signed by C. as surety. He testified that he agreed to sign the note because a lien was reserved and so stated to the vendor and purchaser, and also so stated to the purchaser's vendee. Held, not to show a waiver of the vendor's lien for the balance of the purchase money.—*Ib.* 180.

## VERDICT.

See Criminal Law.

## WITNESSES.

See Evidence; Trial.

## 1. Competency.

*Witness; Competency; Husband and Wife; Offense Against the Person of One or the Other.*—The husband is a competent witness against the wife under a charge of assault with intent to murder the husband.—*Williams v. The State*, 4.

*Witnesses; Competency; Pecuniary Interest.*—The conveyance by the husband and wife of the wife's separate estate, constituting her homestead as security for the husband's debt, being absolutely void, the legal title to the same, under section 2077, on the death of the wife, vests in the surviving minor children and cuts off any estate by curtesy in the husband; and the husband has no pecuniary interest in the result of a suit to subject the land to the debt of the grantee under the conveyance as will disqualify him as a witness.—*Harper v. T. N. Hayes Co., et al.*, 174.

## 2. Examination and Cross.

*Witnesses; Cross Examination.*—As to whether or not what a witness has stated is true is a question for the jury, and, hence, it is improper to permit a witness to be asked on cross examination if in making a certain statement witness told the truth.—*Wright v. The State*, 28.

*Witness; Examination; Answer; Responsiveness.*—It is not error to exclude the answer of a witness which is not responsive to the question propounded.—*Birmingham Ry. L. & P. Co. v. King*, 504.

## WATER AND WATERCOURSES.

## 1. Obstruction of.

*Water; Surface Water; Obstruction; Nuisance; Injunction.*—The land owner's remedy at law being inadequate equity will grant relief to abate a nuisance consisting of the construction of a railroad embankment which impeded the flow of surface water and constitutes a permanent and continuous obstruction thereof causing such water to overflow the land.—*A. G. S. R. R. Co. v. Prouty*, 71.

*Same.*—A railroad company has no right to obstruct the natural flow of surface water by its embankments to the injury of the higher land-owner.—*Id.* 71.

## 2. Overflowing Lands.

*Water and Water Courses; Dam; Construction; Prescriptive Rights.*—A mill owner, who has maintained a dam at the height of four feet for several years, does not thereby acquire a prescriptive right entitling him to raise the height to seven feet; nor does the bar of the statute apply to the increased height, unless the increase has existed for more than ten years.—*Cobia, et al. v. Ellis*, 108.

*Waters and Watercourses; Ditches; Flooding Land.*—As the company would be liable for damages from ordinary floods, it is liable for damages caused by the digging of a ditch along its right of way leading and emptying into a creek, through which ditch, in times of high water, the waters from the creek flow, and after passing through openings in defendant's track,



WATER AND WATERCOURSES—*Continued.*

overflow plaintiff's lands, although the ditch was not negligently constructed and the damages only occur during high waters.—*Lindsey v. Southern Ry. Co.*, 349.

*Same; Action; Pleading.*—It is not necessary for the complaint to aver that the ditch was negligently constructed, in an action for damages for flooding lands caused by the construction of a ditch opening into a creek, and through which, in time of high water, water from the creek flowed and overflowed the lands; nor is such complaint objectionable because it avers that the damages occurs during high waters, because the defendant is liable for ordinary floods, and if unprecedented, this is a defense which need not be negated by the complaint.—*Id.* 349.

## 3. Pollution of Stream.

*Waters and Water Courses; Pollution; Action; Pleading.*—The averment in a complaint of plaintiff's ownership of the land and permanent damages to the fee does not render the complaint demurrable in an action for injury to plaintiff caused by defendant's throwing refuse matter into the streams, thought the injury is against the possession.—*Tuticiler C. C. & I. Co. v. Wheeler*, 354.

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